

# *The European Court of Justice and the GATT Dilemma:*

## *Public Interest versus Individual Rights?*

*Kees Jan Kuilwijk*

Thesis submitted for assessment with a view to obtaining the degree of Doctor  
of the European University Institute in Florence

19 September 1995

I want to ... underline the importance of resisting protectionist pressures to ensure that the Community's internal market remains open to all. An open trading policy is a key element in the logic underlying the Treaty of Rome, and has been the basis of the Community's growth and prosperity. To preserve it we need to show that this policy is in our interest today more than ever, and that the Community must take a lead in extending free trade globally. Sir Leon Brittan, 'The Future of an Open Europe', Jean Monnet Lecture by Sir Leon Brittan at the European Business School, 3 March 1989, IP/89/129, p. 1.

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# I

## Introduction

*"Now can you see, my son, the brief mockery of the goods that are committed to Fortune, for which humankind contend with one another; because all the gold that is beneath the moon, or ever was, would not give rest to a single one of these weary souls". "Master," I said, "now tell me further: this Fortune which you touch on here, what is it, which has the goods of the world so in its clutches?" And he to me, "O foolish creatures, how great is the ignorance that besets you!"<sup>1</sup>*

### A. The Divine Comedy of European Economic Integration

WHEN you are in Florence and you take that broad avenue which leads directly from the Duomo to the Piazza della Signoria and, just before the Orsanmichele, you turn left taking the Via dei Tavolini to the Badia Fiorentina, you will pass the house where in the year 1265 the famous poet Dante Alighieri was born. Dante was a prominent inhabitant of the city on the banks of the Arno, not only for his poetry but also because of his active involvement in local politics. He held several public offices and in the year 1300 he even was elected to the Priorate, the highest administrative body of Florence. However, after a change of powers in 1302 he was banned from his home town, initially for a period of two years. Since Dante during his exile frequently criticized the "criminal Florentines" in general, and the new municipality in particular, he never was permitted to return. Dante died in Ravenna in 1321. The poet's masterpiece *La Divina Commedia* was in fact written in exile. Dante simply called it the *Commedia*,<sup>2</sup> not because it was intended as a comedy but for two other reasons. In the Middle Ages 'commedia' was the common appellation for a tale that starts out sadly but has a happy ending. Dante's narrative was presented in this manner and hence the title. Moreover, Dante wittingly meant to break a tradition. In those days, it was common usage

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<sup>1</sup> Dante Alighieri, *The Divine Comedy* (1320), translated by Ch.S. Singleton, Bollingen Series LXXX, Princeton University Press (1977), Inferno, Canto VII; (conversation between Virgil and Dante at the commencement of their journey through Hell).

<sup>2</sup> The qualification 'Divina' was added to the title by Giovanni Boccaccio out of admiration for the epic poem.

that only works broaching mere trivial topics were written in popular language. Serious treatises, however, had to be written in Latin. By writing the *Commedia* in Tuscan, Dante indicated that, with his serious message, he sought to address the ordinary citizen. It was his intention to warn his fellow citizens. In the second half of the thirteenth century, Florence had become the stage of bloody conflicts between the various societal groups. Revolts, murder, arson, plundering and corruption formed part of everyday life. Like anywhere else in Italy, the struggle for power was a struggle between papal and imperial authority. Initially, this battle concerned two main parties, the Guelfs, who supported the Pope, and the Ghibellines, who supported the Holy Roman Emperor. In Florence, the conflict was decided in favour of the former when the citizenry, which had become wealthy by developing trading activities, interfered and took sides. The Guelfs, however, also split up in two groups, the Blacks and the Whites, and these parties continued the power struggle.

*The Divine Comedy*, in which the poet himself acts as the leading character, describes the ultramundane journey Dante undertook in the holy year 1300 through the three realms of the hereafter, Hell (or Inferno), Purgatory and Paradise. The first realm Dante visits on his journey is Hell, where scorching sandy plains, thorny bushes, wild rivers and stinking pools make existence miserable for the souls who have sinned. According to the seriousness of the sin, they are lodged in different, descending reaches such that the lower the reach that they inhabit, the worse is the sin that brought them there. For these damned souls, there is no hope for salvation. Guided by the classical poet Virgil, Dante descends further and further into Hell. While the sinners are exposed to the most horrifying tortures, he talks to them about various topics. At the lowest point of Hell Dante finally meets Lucifer, the personification of evil. Through a small passage he climbs back up and finds himself at the foot of the Purgatory. He enters and immediately takes notice of the change in environment. The climate is comfortable and the many flowers spread a nice scent. In Purgatory, Dante meets the sinners who are not damned forever but who, after their penance and purification, will be admitted to Paradise. He ascends through the various reaches, which symbolize higher phases of purification, and finally arrives at the earthly paradise, at the pinnacle of Purgatory. Here Dante has to say farewell to Virgil who, as a heathen, may not accompany him beyond the Purgatory. Dante's great love Beatrice, who in real life always remained unattainable for him, takes Virgil's place. She introduces the poet to Paradise, also comprised of various ascending reaches which culminate in the *candida rosa*, the place where God's light shines eternally. As Dante and Beatrice gradually approach the *candida rosa*, the atmosphere

becomes less and less material. The thin air, in which angels hover around, is clear and soft. Dante has profound conversations with the fortunate persons present. Eventually, he shares the *Visio Dei*; he is permitted to see God.

Dante's journey symbolizes the moral development he himself went through during his life and, in a wider sense, the process of development all people striving for moral perfection need to experience. The three realms of the hereafter point to the three phases in Dante's own maturation. Hell refers to the period in which he became conscious of his sinfulness, Purgatory to the period of purification during which he liberated himself from evil, and Paradise to the moment when he found the highest truth, that is, God. Dante's guides also have an allegorical function. Virgil symbolizes the human intellect that provides man with insight into good and evil, while Beatrice represents the faith that can bring man to God. By rejecting Virgil as the person who can guide him to God, Dante wants to show that human intellect may suffice to become a good person but true faith is needed to realize moral perfection. In order to be able to achieve such perfection, one has to accept God's existence in this world. *The Divine Comedy* contains the directions how to travel from the dark forest of sin to the light of salvation. In the broadest sense, *The Divine Comedy* is a true political manifesto. It was Dante's warning to Florence, to Italy, and to Europe. Indeed, it was his warning to the world as he knew it. The internal conflicts in Florence constituted the logical consequence of the situation of chaos in which Italy and the entire Western world found themselves. In Dante's view, both the Pope and the Holy Roman Emperor were to blame for this situation of anarchy. The Pope neglected his spiritual duties while the Emperor neglected his secular ones. The failure of these leaders to unite the people formed the roots of all evil. Only when they came to their senses, would there be hope for a better world.

The development of Europe finally has entered into its second stage. Since Dante's days, hundreds of wars have been fought in this part of the world and millions of people have died in them. But after centuries of seemingly interminable struggle, a ray of hope appeared when two of the main European powers, which were still recuperating from a recent succession of three bloody wars all fought within a seventy five year period, ultimately decided to integrate their economies in an effort to prevent yet another war. This fledgling integration was the humble yet ambitious beginning of what ultimately was to become the European Community (EC). The EC gradually expanded, became embedded in the broader framework of the European Union (EU), and now comprises fifteen States determined to live

in peace and harmony and to increase their economic welfare in a joint effort. The European process of purification via economic integration has resulted in a vast area in which there remain hardly any artificial barriers to trade and shortly, we may hope, an earthly European paradise will be reached in the form of economic and monetary union. However, in the crucial area of foreign trade policy the European Community has long lacked a Virgil.<sup>3</sup> For most of its existence, the Community's trade policy has suffered from negative mercantilist influences. Although it was bound to obey the rules of the world trading system laid down in the General Agreement on Tariffs and Trade (GATT), the Community frequently acted in violation of these rules. On numerous occasions, its trading partners have criticized it for its neglect of the law. In an article appropriately entitled 'The European Community as a Threat to the System', Gardner Patterson inventories the main objections generally uttered against the Community:

the structure of the EC and its decision-making process, which is slow, hard to predict, and has a protectionist bias; the EC propensity toward bilateralism and sectoral arrangements, which ignore the global rules and endanger the very possibility of maintaining international economic cooperation; the EC's tolerance of, even affection for, discriminatory practices, which are particularly burdensome to many developing countries, the nonmarket economies, and Japan; and the Community's reluctance to support effective international dispute settlement procedures, which is a necessary element for a system based on general rules.<sup>4</sup>

Also within the former GATT organization, the Community often was strongly reprimanded. The GATT Trade Policy Review Mechanism Report of April 1991, for example, found that: "Participants highlighted the propensity of the EC to respond to structural adjustment problems by sector-specific approaches to trade policy. The minimal use by the Communities of safeguard action under Article XIX of the GATT as compared to the large number of selective restraint arrangements and anti-dumping measures was noted".<sup>5</sup> Although the European Community surely was not the only trading power breaking the rules, it did seem that its typical decision-making process, Patterson's first mentioned objection, combined with its general objective of harmonization, lead it to grant more actual aggregate protection than perhaps would have occurred had the countries acted in isolation. As L. Alan Winters put it: "the dual desires to establish Community competence and to have a genuinely common policy have led the Commission to adopt something approaching the policy of the most

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<sup>3</sup> Legal competence for trade policy rests with the European Community and not the European Union. Therefore, this study will refer to the European Community unless the wider association is meant. This will become clear from the context.

<sup>4</sup> See G. Patterson, 'The European Community as a Threat to the System', in: W.R. Cline (ed.), *Trade Policy in the 1980s* (1983), p. 241.

<sup>5</sup> See *GATT Focus* 81 (May-June 1991), p. 4.



protectionist major member and to propagate it, even if somewhat diluted, across the whole Community".<sup>6</sup>

In recent years, however, emphasis appears to be slowly shifting from a *dirigiste*, or interventionist trade policy to a policy accommodating and even favouring free trade.<sup>7</sup> Although there are no 'White Papers' or 'Framework Programmes' which indicate such a move,<sup>8</sup> there are clear statements to that effect, arguably echoing a new consensus, which seem to have had an actual impact on law and policy. For example, in 1989 Frans Andriessen, then the Commissioner responsible for EC foreign trade policy, stated that: "Just as the single market means a giant step towards liberalisation within the Community, it has put the Community in the front line of the battle against protectionism and discrimination in international trade ... the Community has no choice but to pursue liberalisation internationally".<sup>9</sup> Andriessen thus acknowledged that the internal market is not intended to operate in isolation but that its functioning should be viewed in a global context. He thereby implicitly attached real significance to Article 110 of the EC Treaty. This article - which provides that "by establishing a customs union between themselves Member States aim to contribute, in the common interest, to the harmonious development of world trade, the progressive abolition of restrictions on international trade and the lowering of customs barriers" - had hitherto been largely ignored when future policy was discussed.

Statements like Andriessen's proved to be of more than mere rhetorical value, for the novel approach was confirmed by the Treaty on European Union (TEU). The new Article 3a EC,

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<sup>6</sup> See L.A. Winters, 'The EC and Protection: The Political Economy', 38 Eur. Econ. Rev. 596 (1994), p. 602.

<sup>7</sup> EC foreign trade policy falls within a broader EC policy framework for competitiveness of EC firms, also including industrial policy and competition policy. See K.J. Kuilwijk and R. Wright, 'Introduction', to: K.J. Kuilwijk and R. Wright (eds.) *European Trade and Industry in the 21st Century: Future Directions in EU Law and Policy*, forthcoming (1995). Such policies (or, industrial policies broadly defined) can be positive and forward looking, their aim to assist the process of structural change, or negative, attempting "to slow down the process of structural change, or more bluntly, to keep declining sectors alive through artificial respiration". See V. Curzon Price, *Industrial Policies in the European Communities* (1981), p. 18.

<sup>8</sup> Arguably, the Commission report *Industrial Policy in An Open and Competitive Environment* did set the tone. See Commission of the European Communities, *Industrial Policy in An Open and Competitive Environment*, Brussels, 16 November 1990.

<sup>9</sup> See F. Andriessen, 'Europe and the World in the 1990's', speech by Frans Andriessen at Chatham House, London, 20 July 1989, p. 2.

inserted by the TEU, provides that economic policy is to be "conducted in accordance with the principle of an open market economy with free competition"<sup>10</sup> and, as Pieter VerLoren van Themaat has noted, this "requested 'open' character of the principle of a market economy clearly refers to the common foreign trade policy and - like Article 110 - requires a 'liberalizing' character of this foreign trade policy".<sup>11</sup> The new liberal approach was most visibly confirmed by the new commitment to global free trade made by the European Community and its Member States in the context of the Uruguay Round. The Community's positive contribution in the final phases of the Round - for example, its strong support for the proposal to establish an official international trade organization and its support for a more effective system of dispute settlement - even lured Claus-Dieter Ehlermann into saying that: "Traditionally, many participants (including some Community representatives) tended to view the GATT as a platform exclusively designed for negotiations, characterizing its provisions as 'soft law' and denying its legally binding nature. That view has considerably changed during the last years".<sup>12</sup>

A permanent lowering of the draw-bridge of our castle, sometimes derogatorily referred to as 'Fortress Europe', would give recognition to the reality of the global economy, would finally establish a true level playing field for EC companies, and would finally allow European consumers true freedom of choice. In this third stage of European economic integration there will be no more special favours for specific sectors of industry, no more trade barriers that prevent European importers from seizing opportunities on the world market, and European consumers will be genuinely free to choose the product that best fits their interest and budget. Sir Leon Brittan, Frans Andriessen's successor as the Commissioner responsible for EC trade policy, has explicitly stated his intent to proceed with, and further advance, the new approach. He even has laid down a number of clear guidelines in order to reach the third stage. First, national economic interest should no longer be defined as being

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<sup>10</sup> See also Articles 102a en 105 EC.

<sup>11</sup> See P. VerLoren van Themaat, 'Some Propositions on the Legal Aspects of the Planned Economic and Monetary Union in its Political, Economic and Social Context Before and After the Ratification of the Treaty of Maastricht', paper presented at the conference "European Law in Context - the Future of European Integration", EUI Florence, 14-15 April 1994; p. 4. See also J.H.J. Bourgeois, Trade Policy-Making Institutions and Procedures in the European Community, in: M. Hilf and E.-U. Petersmann (eds.), *National Constitutions and International Economic Law* (1993), p. 187.

<sup>12</sup> See C.-D. Ehlermann, 'The European Community, its Law and Lawyers', The Second Wilberforce Lecture, 29 C.M.L.Rev. 213 (1992), p. 219.

limited to national borders or national enterprises. Second, one should be highly suspicious of claims that the solution for our European problems can be found in Europe alone. Europe is not isolated from the rest of the world and cannot pretend that it is. Third, in this interdependent world the new European economic policy ought to be an open policy. Europe must have an open trade regime, since interdependence coerces cooperation and free trade: "In the global economy a contrary policy of unfair or beggar-my-neighbour policies would leave us all worse off. As one famous Anglo-Saxon freedom fighter argued, rallying his colleagues at a critical moment, if we do not hang together, we shall assuredly be hanged one by one. A grim message, but a useful reminder of what mutual dependence means".<sup>13</sup> A first step toward attainment of the third stage was to reach intellectual consensus on the benefits thereof. This consensus seems closer than ever before. At least it is now widely acknowledged that the commitment to free trade which is demanded from the Member States is not a request for altruism in the interest of a 'better world', but a contribution in the interest of the Member States themselves; their GNP, their firms, their consumers and their taxpayers. Such a commitment is absolutely imperative on the eve of the 21st century, the century in which the world truly will become a 'global village'.

However, acquiring intellectual consensus on the benefits of an open trading regime is not sufficient when the rules instrumental to reaching the objective are deficient, inconsistent or simply absent. Therefore, an important, second step toward achieving the third stage of European economic integration was revision and improvement of the rules of GATT. The Uruguay Round constituted the necessary worldwide negotiation on the constitutional reform of the world trading system. The semi-official GATT organization was replaced by the official World Trade Organization (WTO) and the WTO now lays down a consistent institutional framework for the conduct of world trade on the basis of the revised rules of the GATT treaty.<sup>14</sup> Unfortunately, however, the Uruguay Round has not been capable of removing the underlying causes for disregard of the law. The endeavour created new respect for the law, but could not secure such respect for the future. Enforcement of obligations at the international level has remained difficult, if not impossible, and therefore protection of the

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<sup>13</sup> See L. Brittan, 'International Economic Relations and Global Markets', speech by Sir Leon Brittan, European Parliament Hearing on International Economic Interdependence, Brussels, 28 September 1993, p. 6.

<sup>14</sup> In this study, the new revised GATT treaty, or GATT 1994, is referred to as 'GATT'. When specifically the 'old' GATT, GATT 1947, is meant, the term 'GATT 1947' will be used.

integrity of GATT law has remained a fundamental problem.<sup>15</sup> It is clear that a new erosion of the GATT rules would jeopardize attainment of the third stage of European economic integration. Despite good intentions and even well-considered plans for an open trading regime, renewed erosion of the rules will seriously inhibit and eventually defeat the efforts to establish such a regime. Since pressure wielded by interest groups appear to be the usual causes of infringements of the GATT rules, it seems that effective guarantees need to be found against the wielding of such pressure in order to prevent these groups from thwarting the plans for an 'open Europe'. The only way a nation can be effectively forced to obey the law is through the rulings of its own highest court, and thus the role of the European Court of Justice in providing such guarantees is crucial. The third and final step toward achieving the third stage has to be initiated by the Court of Justice. The 'divine' guidance of the Court is needed to attain economic paradise. Ultimately, the neglect of GATT law is an internal problem which can be solved only internally.

### *B. Structure and Purpose of the Study*

This study consists of three parts, preceded by an introductory chapter which will provide a brief overview of the background of both the WTO and the EC, as well as the relationship between them. The main purpose of Part 1 is to examine the law 'as it stands', that is, the current status of GATT law in the legal order of the European Community. It is the Court of Justice which determines such issues as the direct effect and supremacy of GATT in Community law. In deciding these matters, the Court may take an autonomous and liberal approach in favour of the effective application of international law, or a dependent and conservative approach taking into consideration that important trading partners, such as the United States and Japan, may not grant direct effect and supremacy to GATT.<sup>16</sup> The questions regarding the status of GATT in Community law will be considered in four different chapters, each chapter being divided into three main sections. The first section of

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<sup>15</sup> It has often been argued that international legal obligations are simply "utopian", because no matter how reasonable a rule may seem at a given time, no government can ever ensure that it shall be able to observe that very rule in the future. See R.E. Hudec, 'GATT or GABB? The Future Design of the General Agreement on Tariffs and Trade', 80 Yale L.J. 1299 (1971), p. 1310. The author criticizes this point of view and argues that it does make sense to lay down legal rules.

<sup>16</sup> See M. Hilf, 'The Application of GATT within the Member States of the European Community, with Special Reference to the Federal Republic of Germany', in: M. Hilf, F.G. Jacobs and E.-U. Petersmann (eds.), *The European Community and GATT* 153 (1986), p. 175.

each chapter will review the Court's solutions to the problems as they have arisen within the context of the Community legal system, that is, in the relationship between Community law and the domestic law of the Member States. The second section of each chapter will examine the Court's point of view in respect of international agreements in general. Finally, the third section of each chapter will look at the Court's attitude towards the GATT treaty in particular. The discussion will demonstrate that, to a large extent, the Court of Justice adopts a different attitude towards GATT than towards other international agreements binding the Community. The main questions considered will be whether such 'differential and less favourable treatment' is warranted and how convincing the arguments are which are provided by the Court to justify its position.

The central case-study, *Germany versus Council*<sup>17</sup> (or the *Banana Case*), is the topic of Part 2 which seeks to reveal the Court's dilemma in deciding the classic trade-off between public interest and individual rights in the specific area of foreign trade policy. The main question which will be considered is whether measures adopted in an area covered by GATT law should not be considered manifestly erroneous when they are incompatible with GATT law. The wider issue involved is whether the Community public interest would have been better served, and the fundamental human rights of Community traders would have been better protected, had the Court of Justice opted for interpretation of certain constitutional principles of Community law in conformity with corresponding basic principles of GATT law. Since GATT law serves the public interest of WTO Members - whereby it proceeds from the assumption that traders should be left as free as possible to seize business opportunities - the Court faces a dilemma when trying to balance public interest and individual rights in the area of foreign trade policy. The various issues are considered in two separate chapters. The first chapter will focus on the case itself and seeks to identify the typical GATT dilemma. The second chapter then will attempt to provide an answer to the fundamental question formulated above: should measures adopted in an area covered by GATT be considered manifestly erroneous when they are incompatible with GATT law?

Part 3 of this study sets out to furnish theoretical support for the arguments presented in Parts 1 and 2. It thus addresses the objections raised against both the way in which the Court of Justice values GATT and against its reluctance to intervene when individual rights of traders are violated by Community foreign trade legislation. The methodology which will be

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<sup>17</sup> Case C-280/93 *Federal Republic of Germany v. Council of the European Union*, not yet reported.

used for this purpose finds its basis in the field of international political economy (IPE).<sup>18</sup> An integral part of this field is the political economy of international trade. Within this more confined field, authors typically aspire to find answers to questions concerning both actor behaviour and system management.<sup>19</sup> Actor behaviour usually means government behaviour. What exactly motivates governments in their foreign economic relations? What are they trying to achieve? System management, on the other hand, concerns the way in which nations collectively try to reap the mutual benefits of international trade. Are countries able to cooperate in the trade field? How do they manage or fail to manage their conflicts?<sup>20</sup>

Part 3 will focus on the issue of actor behaviour as it pertains to the European Community. Scholars who have studied the behaviour of governments usually have focused on two separate issues. Not only have they addressed the question of what it is that fundamentally motivates states in their foreign economic relations, but they also have concentrated on the issue of how best to explain foreign trade policy behaviour of governments.<sup>21</sup> The first issue is conceptual, as it concerns attempts to define the concept of 'state interest'. Economists who have analyzed this concept have usually defined it in terms of real economic welfare. Just as consumers seek to maximize consumption and producers seek to maximize their net income, governments simply seek to maximize real economic welfare for the entire nation. Political scientists, however, have pointed out that governments also have other objectives. Governments value the national security of their country and the preservation of their culture, and they often attach importance to a fair distribution of national economic welfare. These noneconomic objectives usually are subsumed under the general heading 'power', whereby power is loosely defined as 'the ability to influence outcomes'.<sup>22</sup> So governments care about 'wealth' and 'power' and an obvious question which needs to be answered pertains to how these two objectives interrelate. The second issue is methodological as it

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<sup>18</sup> See generally S. Strange, *States and Markets* (2nd. ed. 1994); R. Gilpin, *The Political Economy of International Relations* (1987).

<sup>19</sup> See B. Cohen, 'The Political Economy of International Trade', 44 *International Organization* 261 (1990), p. 262.

<sup>20</sup> See Cohen, *supra* note 19, at 264. The main issues concerning system management are dealt with in Chapter II and Part 1. It will be shown that economic history is characterized by an increasing role of the rule of law in the international trade field. Increasingly, nations try to solve their conflicts with reference to the law.

<sup>21</sup> See Cohen, *supra* note 19, at 267.

<sup>22</sup> See Cohen, *supra* note 19, at 271/272.

involves a choice between possible levels of analysis.<sup>23</sup> Scholars who have focused on this second issue, the question of how best to explain foreign trade policy behaviour of governments, have usually opted for an analysis at either the system level or the unit level. At the system level of analysis, the state is viewed as a rational and unitary actor. Government behaviour is studied from the 'outside-in'. Analysis at the unit level involves a study of the strategic interactions among all domestic actors, both inside and outside the government, which may influence a government's actions. Government behaviour is studied from the 'inside-out'.<sup>24</sup> The specific topic of this study requires an analysis at the unit level.

The political economy model which provides the theoretical support for the fundamental arguments of this study is further complemented by a legal pillar. The intellectual materials for this pillar will be supplied by two respected and renowned scholars, James Buchanan and John Rawls. James Buchanan is within economic science the most prominent theorist in the area of constitutional economics.<sup>25</sup> His theory is based on an integration of economics, political science and law and is therefore particularly suited to verify the constitutional alloy of Community trade policy. Buchanan will provide the bridge between the economics of Adam Smith and the law and politics of the European Community regarding GATT. John Rawls is generally hailed as the thinker who, with his work *A Theory of Justice*, has elevated the discussion about the concept of 'justice' to a higher level.<sup>26</sup> Evidently, the justice of legal rules is an essential point. It is an issue of the highest importance to judges, especially to those who render judgments from which no appeal is possible. Free trade is usually advocated only from a utilitarian perspective, while fundamental human rights are ignored. This study seeks to defend the view that free trade is to be preferred to protectionism on both utilitarian and human rights grounds. It proceeds from the (perhaps naive) assumption that law is still a tool for making a just society. The arguments presented are intended to lend support to the main proposal advanced in this work, which is that the European Court of Justice should change its skeptical view of GATT and should allow GATT law to play its full constitutional role in order to assist the Commission and the Council in overcoming the

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<sup>23</sup> See Cohen, *supra* note 19, at 267.

<sup>24</sup> See Cohen, *supra* note 19, at 268.

<sup>25</sup> See J.W. de Beus, *Markt, democratie en vrijheid: een politiek-economische studie* (1989), p. 239.

<sup>26</sup> Even his most notable opponent Robert Nozick felt forced to admit that "political philosophers must now either work within Rawls' theory or explain why not". See R. Nozick, *Anarchy, State and Utopia* (1974), p. 183.

protectionist pressures which force them to take decisions detrimental to the Community public interest and in breach of the fundamental human rights of Community traders and consumers. Many readers may feel disturbed by the lack of sympathy for the difficult political issues which are so typical for the European Community. It is submitted, however, that only by taking the legalist route the Community will overcome its infant diseases and will grow up to become a true legal order with a genuine concern for the protection of rights and less concern for 'the eternal compromise'. But before moving on to the substance of this account, it may be helpful to say something about the basic features of the concepts and themes which will be addressed in the three parts of this thesis.

### *C. The Status of GATT in European Community Law*

Usually, international agreements do not contain provisions regulating their application and effect in domestic law, and the GATT is no exception to this general rule. Apart from Article 228(7), which provides that international agreements concluded by the Community are binding on the institutions and the Member States, the EC Treaty does not indicate either whether, or how, a treaty penetrates the Community legal order.<sup>27</sup> No clues are given as to the recognition, effects or rank of international norms. Therefore, in order to determine the status of an international agreement such as GATT in the legal order of the European Community, the attitude of the Court of Justice in resolving these issues has to be examined. Four central questions pertaining to this matter need to be answered.<sup>28</sup> First, does the Court of Justice recognize the international norm as such as a source of law, that is, does the international norm, as it stands, constitute a criterion of validity, or can it be applied only after having been transformed into a norm of Community law? This is the issue of direct application. Second, if the international norm is recognized as such, are private parties given the possibility to invoke this norm before a court of law? This refers to the issue of direct effect. It addresses the question whether the international norm is sufficiently precise and unconditional to be capable of conferring rights on private plaintiffs. Third, in case of conflict between the international norm and a norm of Community law, which has primacy in the Community legal system? Do treaty norms binding the Community have priority over

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<sup>27</sup> The terms 'international agreement' and 'treaty' will be used interchangeably.

<sup>28</sup> Cf. F.G. Jacobs, 'Introduction', to: F.G. Jacobs and S. Roberts (eds.), *The Effect of Treaties in Domestic Law* (1987).



conflicting Community law and do these international norms have precedence over conflicting norms of Member State law? Finally, if the norm of international law can be invoked by private parties, does the Court of Justice interpret the international norm as if it were a norm of Community law, or is it construed in a different manner?

A brief description of the terms employed in this study and the meaning given to the different concepts designated by these terms is necessary for a proper understanding of the issues under examination. It should be remembered that in the European Community the different problems of treaty application arise in two contexts. The first is the application of Community law within the national legal systems of the Member States. The second is the application of treaties between the Community and third States in the Community legal system, including the national legal systems of the Member States.<sup>29</sup> Before a national judge can apply and interpret norms of a legal order exterior to his own, these norms have to be incorporated into his own national legal order.<sup>30</sup> But unlike many national courts, the Court of Justice cannot rely on a clear-cut constitutional provision which prescribes a particular method of incorporation.<sup>31</sup> A brief summary of the different systems or methods of incorporation will make clear which options the Court of Justice has at its disposal.

In most analyses of the force of treaties (or customary international law) in domestic legal systems, a distinction is made between 'monist' and 'dualist' States.<sup>32</sup> In a monist State, the

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<sup>29</sup> See J.H. Jackson, 'Status of Treaties in Domestic Legal Systems: A Policy Analysis', 86 A.J.I.L. 310 (1992), pp. 320/321.

<sup>30</sup> See, e.g., H.G. Schermers and D. Waelbroeck, *Judicial Protection in the European Communities* (1992), p. 116. The term 'incorporation' is sometimes used as a synonym for 'implementation'. Schermers and Waelbroeck, however, use it to designate what the mandate of the national judge is, that is, is he allowed to take the international norm (directly) into consideration or not? In their usage the term 'implementation' rather refers to national legislation which further elaborates and clarifies the international norms.

<sup>31</sup> Compare e.g., Article 55 of the French Constitution and Article 59 of the German Basic Law. See the contributions of J.D. de la Rochere and J.A. Fröwein in F.G. Jacobs and S. Roberts (eds.), *The Effect of Treaties in Domestic Law* (1987).

<sup>32</sup> There are many variations, however, of both the monist and dualist doctrines, and other theories exist as well to analyze the status of treaties in municipal law. There are doctrines that prefer to 'avoid' the question of the relationship between international law and municipal law, and there are doctrines that aim for 'harmonization'. Some authors have even defended the view that municipal law is in its nature always superior to international law (inverted monism). See generally, D.P. O'Connell, *International Law* (1965), 37-88.

legal system is considered to include treaties to which the State is obligated. Thus, the monist theory proceeds from the assumption that a national legal system directly includes international agreements which bind the State, without the need for transformation of such treaties into domestic law. Such treaties are thus 'directly applied', or 'self-executing'. In a dualist State, treaties are part of a legal system separate from that of the domestic law. Here, an 'act of transformation' is needed for the treaty rule to operate in the domestic legal system, that is, there must be a government action by that State which transforms the treaty norm into domestic law.<sup>33</sup> The monist theory derives from the philosophy of Immanuel Kant and favours a unitary conception of law.<sup>34</sup> In this view, international law and domestic law constitute one legal system. States are simply forms of organization, or legal fictions, while the individual is the ultimate subject of law.<sup>35</sup> Once an international agreement has been duly approved and concluded by the competent State organs, it is automatically incorporated into domestic law.<sup>36</sup> The traditional monist claim of the supremacy of international law is often linked with the argument that both international and municipal law ultimately pertain to the conduct and well-being of individuals. International law may be regarded as a self-imposed restraint on governments, voluntarily agreed to as a condition of the proper functioning of the domestic legal systems.<sup>37</sup> In the European Community, the monist system is adhered to in different forms in Belgium, France, Greece, Luxembourg, The Netherlands, Portugal, and Spain.<sup>38</sup>

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<sup>33</sup> See Jackson, *supra* note 29, at 315. For example, a statute duly enacted by the parliament that employs all or part of the treaty language and transforms it into domestic law as a statutory matter. The term 'transformation' cannot be precisely defined and is sometimes confused with 'implementation'. *Ibid.*, at 310 (note 3).

<sup>34</sup> See O'Connell, *supra* note 32, at 38. Monism has also been associated with the work of Hans Kelsen. See his *Reine Rechtslehre* (1934) and *Principles of International Law* (1952).

<sup>35</sup> See D. Lasok and J.W. Bridge, *Law and Institutions of the European Communities*, (5th ed. 1991), p. 263.

<sup>36</sup> See J.H.A. van Loon, 'The Hague Conventions on Private International Law', in: F.G. Jacobs and S. Roberts (eds.), *The Effect of Treaties in Domestic Law* (1987), p. 229.

<sup>37</sup> See E.-U. Petersmann, *Constitutional Functions and Constitutional Problems of International Economic Law* (1991), p. 281. This does not mean, however, that individuals are always 'better off' under the monist doctrine. Even in monist systems, courts may fail to give full effect to treaties by taking the view that the invoked treaty norm does not have direct effect. See F.G. Jacobs, 'Introduction', to: F.G. Jacobs and S. Roberts (eds.), *The Effect of Treaties in Domestic Law* (1987), p. xxvi.

<sup>38</sup> See van Loon, *supra* note 36, at 229. See also Schermers and Waelbroeck, *supra* note 30, at 120. See, however, Lasok and Bridge, *supra* note 35. According to these authors, Greece is dualist.

The dualist position is connected with Hegelianism and stresses the difference between international law and domestic law.<sup>39</sup> International law is a body of rules based on the common will of States and functions only between States.<sup>40</sup> Domestic law is the will of the State internally directed, operating upon the subjects of the sovereign within its jurisdiction. International law and domestic law are therefore two different legal domains.<sup>41</sup> The courts of the State are not empowered to base their decisions on references to international sources.<sup>42</sup> The introduction of an international norm into the national legal system requires its transformation into a national norm. According to the 'dualists', there is an incapacity of the individual in international law. In the words of Anzilotti: "A rule of international law is by its very nature absolutely unable to bind individuals, that is, to confer upon them rights and duties. It is created by the collective will of States with the view of regulating their mutual relations; obviously it cannot therefore refer to an altogether different sphere of relations".<sup>43</sup> In a mitigated form of dualism, customary rules of international law are binding as such, but treaties are subject to national legislation. However, the law approving the treaty at the same time incorporates it into the national legal order.<sup>44</sup> Therefore, in general, parliament cannot amend the text of the international agreement but can only approve or reject it.<sup>45</sup> Germany, Italy and Austria fall into this category. The stronger version of the dualist system can be found in different forms in the United Kingdom, Ireland, Denmark, Sweden and Finland.<sup>46</sup>

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<sup>39</sup> See O'Connell, *supra* note 32, at 41. H. Triepel is generally considered the leading exponent of the dualist theory.

<sup>40</sup> See, e.g., H. Triepel, *Völkerrecht und Landesrecht* (1899), p. 20.

<sup>41</sup> Since international law and domestic law are completely separated there should, in theory, be no point of conflict between the two spheres. See O'Connell, *supra* note 32, at 41.

<sup>42</sup> See H.F. Van Panhuys, 'Relations and Interactions Between International and National Scenes of Law', 112 RdC 7 (1964), p. 14.

<sup>43</sup> See Anzilotti, *Il Diritto Internazionale nei Guidizi Interni* (1905), p. 177. Quoted from O'Connell, *supra* note 21, at 42.

<sup>44</sup> See Schermers and Waelbroeck, *supra* note 30, at 119.

<sup>45</sup> *Ibid.* See also van Loon, *supra* note 36, at 229.

<sup>46</sup> See van Loon, *supra* note 36, at 229. See also Schermers and Waelbroeck, *supra* note 30, at 117. On the particular situation in Austria see I. Seidl-Hohenveldern, 'Relation of International Law to Internal Law in Austria', 49 Am. J. Int'l L. 451 (1955).

There is still much confusion as to the precise meaning or content of such notions as 'direct applicability' and 'direct effect'. Therefore, some prior attention should also be given to these distinct concepts, as well as to the notions 'supremacy', 'priority' and 'hierarchy of norms', and to the meaning of 'treaty interpretation'. The notion 'direct applicability' is very similar to the notion 'self-executing'.<sup>47</sup> Generally, 'direct application' and 'self-execution' of treaty law in a national legal system refer to the degree to which norms of an international agreement are treated directly as norms of domestic law without a further act of transformation.<sup>48</sup> Thus, 'direct application' and 'self-execution' generally mean that courts in the legal system adopt the monist approach and will look to the treaty language itself as a source of law, akin to the way they look at constitutions, statutes or certain other instruments of municipal law.<sup>49</sup> However, the notion 'self-executing' may also refer to the invocability of a treaty norm by private parties.<sup>50</sup> In European Community law, the terms 'direct applicability' and 'direct effect' are usually employed. Initially, the Court of Justice used the term 'direct applicability' to denote that certain Treaty provisions "produce direct effects and create individual rights which municipal courts must recognize".<sup>51</sup> The EC Treaty, however, does not stipulate that certain of its provisions shall have such direct applicability. The only indication is to be found in Article 189 EC which provides that "a regulation shall apply generally. It shall be binding in its entirety and shall be directly applicable in each Member State". The use of the term 'directly applicable' in this provision has been equated with the concept of direct applicability developed by the Court of Justice in respect of provisions of the EC Treaty. Obviously, a regulation is never entirely made up of legally perfect norms. Regulations often contain provisions demanding further measures

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<sup>47</sup> See Jackson, *supra* note 29, at 310 (note 1). See also *Restatement of the Law (Third), The Foreign Relations Law of the United States*, Vol. I, The American Law Institute (1986), pp. 46/47 and 53-56.

<sup>48</sup> See Jackson, *supra* note 29, at 310.

<sup>49</sup> See Jackson, *supra* note 29, at 321. As used by Jackson (and other authors), 'direct application' expresses the notion that a treaty has a 'direct', or 'statutelike', role in the domestic legal system, but it does not want to distinguish between different kinds of such direct roles. Thus, the term 'direct application' both covers situations in which governments might utilize the treaty norm as part of domestic jurisprudence and refers to situations in which private parties can sue on the basis of the treaty norm. See Jackson, *supra* note 29, at 310 (note 1). His use of the term is therefore different from its use in this study.

<sup>50</sup> See, e.g., S.A. Riesenfeld, 'The Doctrine of Self-Executing Treaties and US v. Postal: Win At Any Price?', 74 Am. J. Int'l L. 892 (1980), pp. 896/897.

<sup>51</sup> See J.A. Winter, 'Direct Applicability and Direct Effect: Two Distinct and Different Concepts in Community Law', 9 C.M.L.Rev. 425 (1972), p. 431.

of implementation at the national level before they become sufficiently precise to be applied.<sup>52</sup> Direct applicability in the sense of Article 189 allows a regulation to directly penetrate the legal order of the Member States. A regulation automatically becomes part of the law of the Member States, but certainly not all of its provisions create rights for individuals which courts must protect. Therefore, 'direct applicability' in this sense refers to the first meaning of 'self-executing' and not to the second. Nowadays, the Court of Justice appears to use the terms 'direct applicability' and 'direct effect' interchangeably. As noted above, in this study a clear distinction is made between 'direct applicability' and 'direct effect'.

The concepts of 'supremacy', 'priority' and 'hierarchy of norms', all refer to the situation where an international legal norm is considered incompatible with other legal norms in the national legal system. Constitutions generally are considered superior to international agreements, but the issue is typically the hierarchy of a treaty norm that conflicts with a subsequent national legislative act. In the United States, for example, the 'later in time' rule dictates that the subsequent national law prevails but in many other countries the treaty will have priority over such later acts.<sup>53</sup> In Community law, the question of the supremacy of international agreements has two different aspects. First, in cases of conflict, do international agreements binding the Community have priority over Community law, such as the Treaty, regulations, directives and decisions? Second, do international commitments of the Community have precedence over conflicting domestic law of the Member States?<sup>54</sup> The notion 'treaty interpretation', as used in this study, refers to the question of how the relevant treaty norm is construed. The actual interpretation of the international norm sheds light on the fundamental issue of how a court in a monist regime positions itself in respect of the executive branch. Does the court defer to the executive, that is, does it try to 'avoid' application of international law when it conflicts with domestic law, or does it take an independent stance?

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<sup>52</sup> See Winter, *supra* note 51, at 435.

<sup>53</sup> See Jackson, *supra* note 29, at 318.

<sup>54</sup> See P. Pescatore, 'Treaty-Making by the European Communities', in: F.G. Jacobs and S. Roberts (eds.), *The Effect of Treaties in Domestic Law* 171 (1987), pp. 181/182.

### *D. Case-Study: Germany versus Council*

Apart from GATT, there are other sources of law where individuals and corporate enterprises may search for arguments on which to base their claims for annulment or invalidation by the Court of Justice of Community acts or acts of Member States which adversely affect their interests. For example, any private party may claim that a Community foreign trade policy act violates his fundamental human rights. The Court has declared that it will ensure the observance of these rights by the Community and also by the Member States when they are acting in pursuance of powers granted under Community law.<sup>55</sup> Community acts in the area of foreign trade policy could, for example, infringe the right to property. As a result of import restrictions, an importer could easily lose market shares. Barriers to trade also could violate the general principle of non-discrimination. When trade barriers favour certain countries, this could entail discrimination against importers who happen to have trade relations with exporters in non-privileged countries. The Court has declared that in its protection of fundamental rights it is bound to draw inspiration from constitutional traditions common to the Member States and that in finding these rights it may be guided by international agreements for the protection of human rights on which the Member States have collaborated or of which they are signatories.<sup>56</sup> A notable treaty in this respect is the European Convention on Human Rights to which the Court has often referred.<sup>57</sup> The Court has made clear that the principles on which the Convention is based must be taken into consideration in Community law. An important thesis advanced in this study is that the GATT treaty also contains principles which protect individual rights and that this is one of the reasons why the Court should take GATT law into account when asked to rule on the legality or validity of Community or Member State law in the area of foreign trade policy.

The Court has made clear that fundamental human rights never may be considered absolute. Human rights may be subjected to restrictions laid down in accordance with the public interest. In the Community legal system, fundamental rights are subject to limits justified by the overall objectives pursued by the Community. The Court has promised, however, that

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<sup>55</sup> See, e.g., respectively, Case 29/69 *Stauder v. City of Ulm*, [1969] E.C.R. 419, at 425 (paragraph 7); and Case 5/88 *Hubert Wachauf v. Federal Republic of Germany*, [1989] E.C.R. 2609, at 2639 (paragraph 19).

<sup>56</sup> See, e.g., Case 4/73 *J. Nold v. Commission*, [1974] E.C.R. 491, at 507 (paragraph 13).

<sup>57</sup> See, e.g., Case 44/79 *Liselotte Hauer v. Land Rheinland-Pfalz*, [1979] E.C.R. 3727.

the substance of the right in question always will be left untouched.<sup>58</sup> In other words, the substance of the individual right at issue will be protected under all circumstances. Evidently, furthering of the public interest and genuine protection of individual rights can ensue only from an immaculate balancing of the different interests at stake. This balance necessarily involves a thorough assessment of the content of both the concept of 'public interest' and the concept of 'individual rights'. The Court has stated that it may declare measures illegal only when it is established that there was a manifest error of judgment in the choice of means to achieve the objective of the measure. This position entails that the Court must have some well-defined conception of what constitutes a measure suited to achieve objectives of public interest. The Court thus indicates that it has a well-defined perception of the concept of public interest itself, and also a perception of what the pursuit of it should involve. Since the Court has declared that it will protect the substance of the individual right in question under all circumstances, it must also have clear-cut ideas on precisely what constitutes the substance and what the periphery of a specific fundamental right.

In the hypothetical case that the Community legislature would adopt a regulation imposing a 100% tax on all exports of cheese to promote, in the Community public interest, the cheese export trade, it may be expected that the Court will annul the relevant provision of the regulation as constituting a manifest error of judgment in the choice of means suitable to achieve the objective of the measure. The Court knows that a levy of 100% tax upon exportation will not promote the export of a product and we may expect the Court to act accordingly and strike down the measure. Likewise, the Court probably will strike down a Community measure, again enacted in the public interest, introducing a traditional Easter burning of all buildings owned by Community importers of goods originating in Latin America, as incompatible with the right to property protected by the Court. In these hypothetical cases, the balancing test does not seem to be a difficult one. But where do the borders lie? When can a measure be said to be manifestly erroneous? When is a measure not fit to pursue the public interest? When is the substance of a fundamental right infringed?

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<sup>58</sup> In *Hauer*, for example, the Court considered it "necessary to examine whether the restrictions introduced by the provisions in dispute in fact correspond to objectives of general interest to the Community or whether, with regard to the aim pursued, they constitute a disproportionate and intolerable interference with the rights of the owner, impinging upon the very substance of the right to property"; [1979] E.C.R. 3727, at 3747 (paragraph 23).

The Community legislation that would lead to the highly visible dispute which forms the central case-study of this thesis pertained to the traditional sector of agriculture, a familiar area of EC protectionism.<sup>59</sup> The case in question concerned an action brought by Germany under Article 173, first paragraph, of the EC Treaty for a declaration that Article 21(2) and Title IV of Regulation 404/93 on the common organization of the market in bananas were void.<sup>60</sup> This regulation replaced the existing national market organizations of the Member States, provided the basis for a free flow of bananas throughout the Community, and established a common import regime as regards third countries. Before the Court, Germany argued that not only GATT law but also certain fundamental human rights of traders had been infringed. The Court of Justice, however, felt it could not strike down the contested measures. It held on to its traditional jurisprudence in deciding that it could not substitute its assessment for that of the Council as to the appropriateness of these measures, since the measures had not been shown to be manifestly erroneous to attain the objective in view.<sup>61</sup>

It is clear that in its assessment of the external aspects of EC agricultural policy, the Court of Justice also has to carefully reflect on whether adopted measures truly contribute to the public interest. Measures in this area typically are intended to establish a common market organization. When the Treaty of Rome was signed, the national agricultural markets of the Member States were strongly protected and it was one of the main objectives of the Treaty to bring an end to the fragmentation of the national markets and encourage a free flow of agricultural goods in the Community. This fundamental idea of market unification was based on sound economics. In a customs union, goods flow from the best source (in price and quality) to all corners of the customs union so that consumers can choose from a great variety of low-priced high-quality products and producers are stimulated to be competitive and make the best products they possibly can. However, another fundamental idea which long pervaded the common agricultural policy (CAP) was an idea not based on sound economics but rather on 'inevitable' politics. It was the idea that EC agricultural markets needed to be isolated from third country competition in order to satisfy the farm lobby. This political idea

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<sup>59</sup> See generally, F.G. Snyder, *Law of the Common Agricultural Policy* (1985).

<sup>60</sup> Article 21(2) provides for the discontinuance of special rules which have been applicable to Germany since the entry into force of the EEC Treaty and Title IV describes the rules applicable to third countries.

<sup>61</sup> See, e.g., Joined Cases 267 to 285/88 *Wuidart and Others v. Laiterie Coopérative Eupénoise*, [1990] E.C.R. I-435 (paragraph 14).



was disguised as an economic one: market protection in order to survive and (re)gain competitiveness. The protectionist policy had serious consequences. A tremendous overproduction ensued and billions of ECUs were spent without tangible results.<sup>62</sup> Finally, the Community decided to change its approach. The CAP was adjusted to make it less interventionist and firm commitments were undertaken in the Uruguay Round to finally open up markets and reduce subsidies. However, the fundamental problem that has faced the Community since its inception was not solved. The politics behind the CAP did not change. As the case-study makes painfully clear, the very powerful farm lobby still is capable of steering current policies and frustrating new ones. It still is able to force EC policy makers into *ad hoc* policy flip-flops to the detriment of the whole Community. Indeed, to answer the question of 'how to resist the farm lobby in the interest of Community consumers and taxpayers' is also to answer the question of 'how to stop the farm lobby from embarrassing Community policy makers'. As noted above, the intellectual consensus is there and the new and improved rules are there. The third and final step requires genuine involvement of the Court. How can GATT law help to overcome protectionist pressures?

#### E. The Functions of GATT in European Community Law

More than two hundred years ago, the Scottish economist and philosopher Adam Smith showed that protectionism is detrimental to a country's own economic welfare.<sup>63</sup> If trade is liberalized, Smith argued, individual traders will be better able to develop their talents and, through the mechanism of the 'invisible hand', they will serve the country's economy. In other words, if an individual is left free to trade the public interest will be promoted. Smith saw it as a basic task of the State to establish a system of 'natural freedom protected by law'. He already recognized the danger of interest groups which "like an overgrown standing

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<sup>62</sup> The CAP has been severely criticized. For a recent critique see M. Atkin, *Snouts in the Trough: European farmers, the Common Agricultural Policy and the Public Purse* (1993). The author concludes his study by stating that "the Common Agricultural Policy is an outrageously inefficient policy. It has been a mechanism whereby a small number of European citizens have lined their pockets at the public's expense, with cover provided by politicians' invocations of noble ideals of European Unity. It symbolizes an inward orientation of the European Community, and this orientation is profoundly dangerous to the prosperity of Europe and the wider world. The CAP must be abolished, and Europe must adopt economic and political policies that are more open to the outside world". *Ibid*, at 169/170.

<sup>63</sup> See A. Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations* (1776), in the edition of R.H. Campbell, A.S. Skinner and W.B. Todd, Clarendon Press, Oxford, 1976 [hereinafter *The Wealth of Nations*].

army" become "formidable to the government, and upon many occasions intimidate the legislature".<sup>64</sup> In his proposal for a system of individual economic liberty protected by law this "overgrown standing army" would be curbed. In Smith's perception, individual economic liberty was a matter of justice, for "to prohibit a great people, ..., from making all that they can of every part of their own produce, or from employing their stock and industry in the way that they judge most advantageous to themselves, is a manifest violation of the most sacred rights of mankind".<sup>65</sup> Although some of the basic ideas behind Smith's theory found general application, both on a regional (EC, EFTA, NAFTA, Mercosur) and a global (GATT, OECD) level, its full consequence, no trade barriers no matter where goods originate, still appears to be a policy difficult to implement. It seems that the final step toward securing an open EC trading regime, as called for by Commissioner Sir Leon Brittan, can be made only with the assistance of a constitutional safeguard against the thwarting of rational policy by pressure groups. As noted above, it is the European Court of Justice which could provide such a safeguard. The third stage of European economic integration will not be achieved if the Court of Justice stays aloof.

In balancing public interest and individual rights, the Court of Justice should at least reflect on the question whether the Community public interest would not be promoted by enhancing the individual rights of EC traders. Surely, it is not the task of the Court to dictate EC foreign trade policy. However, it is its task to ensure that the law is observed in the Community. It is clear that this law should be fair, rational and predictable. GATT law could function to secure such a fair, rational and predictable legal framework wherein traders can go about conducting their business on equal terms. In this manner, GATT law would, in practice, function as a constitutional check on secondary EC legislation. Usually, irrational legislation tainted by interest group pressure will not pass the GATT test. Acceptance of some of Smith's basic ideas, as later complemented by certain elements of the theories of John Rawls and James Buchanan, would bring about a more equitable foreign trade policy. *In concreto*, this would have to involve an anchoring of basic GATT principles, in particular the principle of non-discrimination, in Community law. According to Sir Leon Brittan, securing the non-discrimination principle was the Community's main mission in the Uruguay Round. The Community aspired to get "the assurance that all of the developed countries recognise

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<sup>64</sup> See *The Wealth of Nations*, at IV.ii.43.

<sup>65</sup> See *The Wealth of Nations*, at IV.vii.b.44.

the need to ensure effective market access for their competitors, and national treatment, that is the same treatment for foreign firms as for their domestic counterparts".<sup>66</sup> If the Court does not act, the mission will soon prove to have been in vain. The Court ought to act, not for the sake of the *pacta sunt servanda* or a 'brotherhood of nations', but simply and solely for the sake of the European Community and its citizens. The present study seeks to address the question whether protectionist trade policies of the European Community harm the interests of Community citizens and the interest of the Community at large and, if they do, whether GATT law can serve to protect these interests. The object in view is to offer a suggestion for an improvement of the conditions under which EC trade policy is conducted. A stronger position of GATT law in the Community legal order forms the essence of this proposal.

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<sup>66</sup> See L. Brittan, 'The Future of an Open Europe', Jean Monnet Lecture by Sir Leon Brittan at the European Business School, 3 March 1989, IP/89/129, p. 2.



## II

### *The WTO and the European Community: The Historical Dimension*

*Today peace depends not only on treaties or promises. It depends essentially on the creation of conditions which, if they do not change the nature of men, at least guide their behaviour towards each other in a peaceful direction. That is one of the essential consequences of the transformation of Europe which is the object of our Community ... Faire l'Europe, c'est faire la paix.<sup>1</sup>*

#### A. Introduction

THERE are several similarities and links between GATT and the European Community. Indeed, the General Agreement was one of the main reference points on which the EEC Treaty was modelled. Pierre Pescatore has noted that it was primarily the GATT, together with the model of the Organization for European Economic Co-operation (OEEC) and the Benelux Treaty, which provided the conceptual and legal framework within which the negotiations on the core of the Community took place.<sup>2</sup> The GATT's basic concepts, such as customs duties and quantitative restrictions, were taken over by the founding Member States, although in a perhaps somewhat more comprehensible fashion. According to Pescatore "the draftsmen of the EEC Treaty have summarized with continental succinctness what GATT expresses with Anglo-Saxon discursiveness".<sup>3</sup> Both the GATT treaty and the EC Treaty are based on the 'Rule of Law' and both serve the purpose of non-discriminatory trade. They may be described as "the first successful attempts in the history of international economic relations to translate neo-liberal economic and legal principles into multilateral trade treaties".<sup>4</sup> Naturally, the objective of the EC Treaty transcends that of GATT, already before

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<sup>1</sup> Jean Monnet in a speech at Aachen, 17 May 1953; Quoted from: J. Pinder, *Europe Against De Gaulle* (1963), p. 7/8.

<sup>2</sup> See P. Pescatore, 'Introduction', to: M. Hilf, F.G. Jacobs and E.-U. Petersmann (eds.), *The European Community and GATT* (1986), p. xv. In 1961, the OEEC became the OECD, the Organization for Economic Cooperation and Development.

<sup>3</sup> *Ibid.*

<sup>4</sup> See E.-U. Petersmann, *The European Communities and GATT: On the Economic and Legal Functions of GATT Rules*, 1 L.I.E.I. 37 (1984), p. 37.

the amendments made at Maastricht. Designated by the Court of Justice as a "new legal order"<sup>5</sup>, the Community "leads its own life in the economic and legal spheres".<sup>6</sup> To distinguish the novel Community system from the categories hitherto known on the international plain, the term 'supranational' was invented. According to Pescatore, "the use of this new word was intended, in the minds of the creators of the new Community structures, to indicate the originality of the task, which it appeared impossible to describe adequately by means of the well-worn categories of international law".<sup>7</sup>

This introductory chapter seeks to address some of the issues identified in the Introduction from a historical point of view. Why did the nations of the world negotiate a treaty on trade liberalization? Why did the nations of Western Europe negotiate a treaty on trade liberalization? First, the origins and objectives of the WTO will be considered, then the origins and objectives of the European Community. Subsequently, a brief analysis will be provided of the status of the European Community in GATT law. Issues to be addressed include the compatibility of the Rome Treaty with GATT law, the WTO memberships of the EC and the Member States, and problems of internal competence ensuing from these memberships. The Court's recent Opinion 1/94 on the competence of the Community to conclude the agreements concerning services and the agreements concerning protection of intellectual property rights negotiated within the framework of the Uruguay Round directly dealt with this last issue and, therefore, will be examined in some detail.

### *B. Origins and Objectives of the WTO*

As John Jackson notes, GATT was never designed to play the role of principal international trade organization which it came to play, but rather "became by default, the general

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<sup>5</sup> Case 26/62 *Van Gend & Loos v. Nederlandse Administratie der Belastingen*, [1963] E.C.R. 1, at 12: "... the Community constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights, albeit within limited fields..."

<sup>6</sup> See Pescatore, *supra* note 2, at xvi.

<sup>7</sup> See P. Pescatore, *The Law of Integration* (1974), p. 48. On the nature and meaning of supranationality see, in particular, E.B. Haas, *The Uniting of Europe* (1958), Ch. 2.

regulatory institution for world trade".<sup>8</sup> GATT grew out of a string of events that sprouted from two important themes in the historical evolution of American foreign economic policy.<sup>9</sup> The first theme was the United States' reciprocal trade agreements program, which began with the enactment of the Reciprocal Trade Agreements Act in 1934.<sup>10</sup> A major initiative of the new Roosevelt Administration, the Act was an instrument devised by Secretary of State Cordell Hull to increase exports through the negotiation of bilateral trade agreements in order to reverse the negative consequences for the United States of the infamous Smoot-Hawley Tariff Act of 1930.<sup>11</sup> Under the latter Act, United States tariffs had been pushed to the highest levels in its history, triggering "protests from 34 countries and a thousand American economists".<sup>12</sup> Under the Reciprocal Trade Agreements Act, Congress delegated to the President authority to enter into international tariff and trade reform agreements and to implement those agreements into United States domestic law without further reference to Congress.<sup>13</sup> From 1934 to 1945, 32 bilateral trade agreements were negotiated and accepted by the United States.<sup>14</sup> Nearly all of the clauses in GATT can be traced to one or another of the forerunner provisions contained in these agreements.<sup>15</sup> It was Cordell Hull, in particular, who took the initiative for the new endeavour. Hull realized that economic cooperation would lead to more stability in international relations by creating closer bonds between countries than ever would be possible through mere political cooperation. In 1937 he would

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<sup>8</sup> See J.H. Jackson, 'The General Agreement on Tariffs and Trade in United States Domestic Law', 66 Mich. L. Rev. 249 (1967), p. 252.

<sup>9</sup> See J.H. Jackson, 'The Birth of the GATT-MTN System: A Constitutional Appraisal', 12 L. & Pol'y Int'l Bus. 21 (1980), p. 28 [hereinafter: GATT-MTN]. See also J.H. Jackson, *World Trade and the Law of GATT* (1969), p. 37 [hereinafter: *World Trade*]. W.A. Brown, *The United States and the Restoration of World Trade* (1950), p. 61.

<sup>10</sup> An Act to Amend the Tariff Act of 1930, Part III, 48 Stat. 943, 19 U.S.C. 1351-66, effective June 12, 1934. Arguably, this new, more definite 'neo-liberal outlook' of the United States had been heralded by President Wilson in his Fourteen Points in 1915 and by the shift from 'conditional' to 'unconditional' most-favoured-nation policy in 1923. See A. Cassese, *International Law in a Divided World* (1986), p. 324.

<sup>11</sup> Tariff Act of 1930, 46 Stat. 590. In June 1930, the Smoot-Hawley Tariff raised tariffs on about 900 items. This was followed by a world-wide wave of tariff increases. See Brown, *supra* note 9, at 39.

<sup>12</sup> See S.D. Metzger, *Trade Agreements and the Kennedy Round* (1964), p. 12.

<sup>13</sup> See Jackson, GATT-MTN, *supra* note 9, at 28.

<sup>14</sup> See Jackson, GATT-MTN, *supra* note 9, at 28/29. For a listing of the 32 agreements see Jackson, *supra* note 8, at 332.

<sup>15</sup> See Jackson, *World Trade*, *supra* note 9, at 37.

write: "I have never faltered, and I will never falter, in my belief that enduring peace and the welfare of nations are indissolubly connected with friendliness, fairness, equality and the maximum practicable degree of freedom in international trade".<sup>16</sup>

The second theme emerged during World War II, when American policy-makers developed a tangible plan to liberalize global trade multilaterally through the establishment of international economic institutions, in order to prevent the type of policies that had been extremely harmful to world trade during the 1920s and 1930s.<sup>17</sup> The political and economic causes of the worldwide increase in protectionist policies between World War I and the Great Depression can be traced, *inter alia*, to the surge of nationalism that followed the creation of new States, the feelings of political and social insecurity in many countries, and long-established beliefs in protectionism as the foundation of domestic prosperity.<sup>18</sup> Although international economic issues had been considered at four major conferences during the 1920s,<sup>19</sup> these conferences had not been capable of generating the trust needed to promote mutual reduction in trade barriers.<sup>20</sup> Despite the fact that most of the conferences were sponsored by the League of Nations, each successive conference was in fact an independent event, the typical result of which usually was an agreement by the participating nations that settled for best principles but which was sorely lacking in commitments to the details. Slowly, it became clear that future efforts would have to be more specific and that commitments would have to be monitored by more permanent institutions.<sup>21</sup>

Even as it was proceeding with its trade agreement program during World War II, the United States also was looking ahead to the course to be followed on a global level after the war. A new approach for solving the recurrent problems that had not been handled successfully

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<sup>16</sup> See C. Hull, *Economic Barriers to Peace* (1937).

<sup>17</sup> See Brown, *supra* note 9, at 61.

<sup>18</sup> See Brown, *supra* note 9, at 37.

<sup>19</sup> These were the Brussels Financial Conference of 1920, the Genoa Conference of 1922, the Geneva World Economic Conference of May 1927, and the Geneva Conference of October 1927. See Brown, *supra* note 9, at 30-33.

<sup>20</sup> See R.E. Hudec, *The GATT Legal System and World Trade Diplomacy* 6 (2nd. ed. 1990), p. 6.

<sup>21</sup> See Hudec, *supra* note 20, at 7.



during the interwar period needed to be found.<sup>22</sup> American postwar planners were determined to end economic isolationism and nationalism and strove to create a multilateral trading system which could form the basis for peace and prosperity.<sup>23</sup> In the system which they envisioned, barriers to trade would be reduced to moderate levels and made non-discriminatory in their application.<sup>24</sup> During the early years of World War II, the United States sought the cooperation of its major trading partner, the United Kingdom, to define the common economic objectives of both nations.<sup>25</sup> In Great Britain, however, a major difference of opinion existed with regard to the course to be taken after the war. In certain circles, the American insistence on non-discriminatory trade encountered considerable opposition: "British industrialists and government officials were not inclined to see any weakening of Imperial Preference no matter what the United States thought or said about the subject".<sup>26</sup> Nonetheless, a first meeting occurred during the Atlantic Conference held in August 1941.<sup>27</sup> Although the official purpose of the meeting was to organize resistance to Nazi aggression, it brought the leaders of the two nations, Franklin D. Roosevelt and Winston Churchill, to reflection on the postwar world. Financial and commercial policy was discussed and two economic clauses were drafted to be included in the 'Atlantic Charter':

The United States and Great Britain will endeavor, with due respect for their existing obligations, to further the enjoyment by all States, great or small, victor or vanquished, of access, on equal terms, to the trade and to the raw materials of the world which are needed for their economic prosperity ...

They further desire to bring about the fullest collaboration between all nations in the economic field with the object of securing, for all, improved labor standards, economic adjustment and social security.<sup>28</sup>

Although the Atlantic Charter was generally praised as a manifesto against discrimination

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<sup>22</sup> See Brown, *supra* note 9, at 47.

<sup>23</sup> See R.N. Gardner, *Sterling-Dollar Diplomacy in Current Perspective* (1980), p. 23.

<sup>24</sup> See Gardner, *supra* note 23, at 13.

<sup>25</sup> American postwar planning may be perceived as an American 'challenge' to which the United Kingdom had to respond. See Gardner, *supra* note 23, at 1-39.

<sup>26</sup> See J. Culbert, 'War-time Anglo-American Talks and the Making of the GATT', 10 *The World Economy* 381 (1987), p. 385.

<sup>27</sup> The Atlantic Conference began on 9 August, 1941, in Placentia Bay, Newfoundland. See, e.g., Gardner, *supra* note 23, at 42.

<sup>28</sup> See U.S. Department of State Bulletin, August 16, 1941, at 125; Joint Declaration by the President of the United States of America and Mr. Winston Churchill representing His Majesty's Government in the United Kingdom, known as the Atlantic Charter, August 14, 1941.

in international trade, Cordell Hull was not happy with the document. In private circles, he expressed his displeasure over the phrase "with due respect for their existing obligations" in the first clause. In his view, this phrase meant that Imperial Preference would be retained.<sup>29</sup>

The United States and the United Kingdom made a second effort to identify common post-war economic goals in the 1942 Mutual Aid Agreement.<sup>30</sup> This Agreement administered the provision of so-called Lend-Lease supplies. Under the Lend-Lease program, the President was authorized to provide defense articles to countries whose protection he considered vital to the national security of the United States. He had broad discretion to determine the conditions of the Lend-Lease settlement, but the terms of that settlement were to hold some 'benefit' to the United States. Executive branch officials identified the promise by Britain and other grantees to cooperate in the postwar reconstruction of multilateral trade as such a *quid pro quo*.<sup>31</sup> Article VII, which concerned the terms of Lend-Lease settlement, resulted in a further exchange of standpoints on postwar trade policy and emerged as a more detailed commitment to multilateralism than had been called for in the economic clauses of the Atlantic Charter.<sup>32</sup> Subsequently, in the autumn of 1943, an informal meeting on commercial policy was organized between British and American government representatives. These talks confirmed the consensus which existed on the general outlines of commercial cooperation, such as the need for eliminating quantitative restrictions and the importance of finding an automatic tariff-reducing formula to expedite the substantial reduction of tariffs. The British and American representatives also agreed on the need for some sort of international trade organization to clarify the multilateral principles and to settle disputes among members.<sup>33</sup> In fact, plans for such an organization had already been worked out by James Meade, an official of the British war cabinet.<sup>34</sup>

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<sup>29</sup> See Culbert, *supra* note 26, at 386.

<sup>30</sup> The full title of this agreement is: Agreement Between the Governments of the United States of America and the United Kingdom on the Principles Applying to Mutual Aid in the Prosecution of the War Against Aggression. See Brown, *supra* note 9, at 47.

<sup>31</sup> See Gardner, *supra* note 23, at 55/56.

<sup>32</sup> See Gardner, *supra* note 23, at 54.

<sup>33</sup> See Gardner, *supra* note 23, at 109.

<sup>34</sup> See Culbert, *supra* note 26, at 388/389. In the first three weeks of July 1944, a conference on monetary and banking issues was organized in Bretton Woods, New Hampshire. This United Nations Monetary and Financial Conference was confined to negotiating international agreements in these

Anglo-American trade talks resumed at the beginning of 1945 with an informal meeting in London between officials of the American Embassy and the British Board of Trade. In September of that same year, commercial policy negotiations began in Washington, which resulted in the publication of the Proposals for Consideration by an International Conference on Trade and Employment.<sup>35</sup> Until then the American postwar commercial policy initiative had not been linked with the development of the economic functions of the United Nations. However, chapter IX of the United Nations Charter delegated far-reaching responsibilities to the Economic and Social Council in the field of international economic and social cooperation.<sup>36</sup> Therefore, the United States decided to seek the sponsorship of the United Nations.<sup>37</sup> At its first meeting on 18 February 1946, the Economic and Social Council approved a resolution for an United Nations International Conference on Trade and Employment, to be held later that year. The Council established a preparatory committee and appointed delegates from the governments of nineteen countries.<sup>38</sup> The first session of the preparatory committee was held in London in October and November of 1946.<sup>39</sup> The report of the London Conference proposed the process that should be followed for a multilateral tariff negotiation and suggested a 'General Agreement on Tariffs and Trade' in order to safeguard the value of the tariff concessions.<sup>40</sup> A drafting committee met at Lake Success, New York, in January and February of 1947, and the first full draft of the General Agreement

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specific areas. At Bretton Woods, the charters of the International Monetary Fund (IMF), on the basis of John Maynard Keynes' design for an International Clearing Union, and the International Bank for Reconstruction and Development (IBRD or World Bank) were negotiated. See J.H. Jackson, *The World Trading System: Law and Policy of International Economic Relations* (1989), p. 31. Meade's blueprint for an International Commercial Union was intended to supplement Keynes' design for an International Clearing Union. See Culbert, *supra* note 26, at 389.

<sup>35</sup> See Gardner, *supra* note 23, at 145/146. The Proposals for Consideration by an International Conference on Trade and Employment consisted of two parts: the Proposals Concerning Employment and the Proposals Concerning an International Trade Organization. The document was published as part of a more inclusive treatise, namely the Proposals for the Expansion of World Trade and Employment. See U.S. Department of State Pub. No. 2411, Commercial Policy Series No. 79 (1945).

<sup>36</sup> See Yearbook of the United Nations 837 (1946-1947). See also Brown, *supra* note 9, at 57.

<sup>37</sup> See Brown, *supra* note 9, at 57.

<sup>38</sup> They were representatives of the governments of Australia, Belgium, Luxembourg, Brazil, Canada, Chile, China, Cuba, Czechoslovakia, France, India, Lebanon, The Netherlands, New Zealand, Norway, South Africa, the U.S.S.R., the United Kingdom and the United States. See Yearbook of the United Nations, *supra* note 36, at 492.

<sup>39</sup> See Jackson, World Trade, *supra* note 9, at 42.

<sup>40</sup> See Jackson, World Trade, *supra* note 9, at 42/43.

was designed. The discussion in New York concentrated mainly on the issue of which articles of the proposed International Trade Organization (ITO) were to be included in the General Agreement. As the London session had decided, the ITO draft charter provisions selected for inclusion were those that were required to protect the tariff concessions still to be negotiated. Although some necessary institutional provisions were included, it was confirmed that GATT would be a trade agreement within the institutional framework of the ITO Charter.<sup>41</sup> The second meeting of the preparatory committee, held in Geneva, concerned itself with two separate tasks. In addition to completing the draft charter for the ITO, it also sponsored the first negotiations for the reduction of tariffs. As noted, these tariff commitments were to be protected by the General Agreement.

It appeared necessary to limit the legal structure of the General Agreement in several ways in order to accommodate domestic ratification procedures.<sup>42</sup> First of all, the United States needed to frame GATT as a 'trade agreement' since it planned to accept it under an extension of the Trade Agreements Act, which authorized the executive branch to accept only a 'foreign trade agreement'. The United States' negotiators had been warned about their approach towards GATT by congressional hearings held between the New York and Geneva meetings. At these hearings, congressmen and senators had criticized executive branch officials who wanted to bind the United States to the GATT under the authority of the Trade Agreements Act.<sup>43</sup> In their opinion, GATT was an organization disguised as a treaty. Several members of Congress questioned the President's authority to accept GATT as a mere reciprocal trade agreement, suggesting that its lack of appearance as an international organization was insufficient to keep the GATT within the margins of Presidential authority. As Jackson has explained, these quarrels between the executive and the legislature over GATT "were the origins of a longlasting congressional hostility to GATT".<sup>44</sup> In addition, the government of the United States and several other nations believed they would not be able to harmonize domestic law in conflict with GATT obligations in time for quick ratification. Finally, some governments simply could not accept any international obligations in their final form without

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<sup>41</sup> See Jackson, *World Trade*, supra note 9, at 43.

<sup>42</sup> See Hudec, supra note 20, at 50.

<sup>43</sup> See Jackson, *World Trade*, supra note 9, at 44/45.

<sup>44</sup> See J.H. Jackson, 'International Economic Problems and their Management in the 21st Century', 9 *Ga. J. Int'l & Comp. L.* 497 (1979), p. 499.

(time-consuming) national ratification procedures.<sup>45</sup> Limitations were thus imposed on the GATT legal structure in order to deal with these various problems. Governments agreed to accept the legal obligations of the General Agreement only 'provisionally', and except for the tariff concessions and the most-favoured-nation guarantee, they further agreed to obligate themselves only "to the fullest extent not inconsistent with existing legislation". These limitations were realized by bringing the General Agreement into effect through a separate protocol, called the Protocol of Provisional Application, which stated the necessary reservations.<sup>46</sup> Additionally, a decision was taken to avoid making GATT a formal international organization in order to help the United States executive branch's assertion that GATT was just a trade agreement.<sup>47</sup> The Geneva draft of the ITO Charter was completed by the end of August 1947, but the tariff negotiations and the completion of the General Agreement continued until the autumn. The Final Act of the second session of the Preparatory Committee, actualizing the GATT, was signed on 30 October 1947. The GATT, as applied by the Protocol of Provisional Application, entered into force on 1 January 1948.

The Havana Conference, formally called the United Nations Conference on Trade and Employment, convened in Havana (Cuba) on 21 November 1947 and lasted until 24 March 1948. This conference considered only the ITO Charter, although at the end of the Conference the First Session of the GATT CONTRACTING PARTIES also met in Havana.<sup>48</sup> The Havana Conference was the climax of years of careful planning for drafting an ITO Charter.<sup>49</sup> At the end of the Conference the Final Act was signed, authenticating the draft charter for the International Trade Organization.<sup>50</sup> At the same time, a resolution was adopted establishing an Interim Commission for the International Trade Organization (ICITO). The Interim Commission laid the foundation for the ITO and resolved several matters of interpretation and information left unfinished by the Havana Conference. The First Session of the GATT

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<sup>45</sup> See Hudec, *supra* note 20, at 50/51.

<sup>46</sup> See Hudec, *supra* note 20, at 51.

<sup>47</sup> *Ibid.*

<sup>48</sup> Article XXV:1 GATT provided that: "Whereever reference is made in this Agreement to the contracting parties acting jointly they are designated as the CONTRACTING PARTIES".

<sup>49</sup> See Jackson, *World Trade*, *supra* note 9, at 45.

<sup>50</sup> See Final Act and Related Documents, United Nations Conference on Trade and Employment, Havana (Cuba), November 21, 1947, to March 24, 1948. U.N. Doc. ICITO/1/4 (1948); *reprinted in* U.S. Department of State Pub. No. 3206, Commercial Policy Series No. 114 (1948).

CONTRACTING PARTIES arranged that secretariat services for GATT be supplied by the ICITO.<sup>51</sup>

In the spring of 1949, the CONTRACTING PARTIES organized the second major round of tariff negotiations at Annecy (France) and in 1950, they scheduled the third round at Torquay (England). By this time, however, the chances that the ITO would come into force had diminished considerably. In December 1950 the United States finally announced that it would not present the draft ITO Charter to Congress for approval. The press release of 6 December 1950 stated that: "the interested agencies have recommended, and the President has agreed, that, while the proposed Charter for an International Trade Organization should not be resubmitted to the Congress, Congress has asked to consider legislation which will make American participation in the General Agreement more effective".<sup>52</sup> Most governments had held up their own ratification procedures until it was assured that the United States would join the ITO. Since the United States was the world's main economic power, no country wanted to enter the ITO without its participation. One of the main reasons behind the failure of the ITO seemed to have been bad timing. The American negotiators had initially planned to lobby for Congressional approval early in 1948, immediately after the Havana Conference, but submission of the Charter was delayed until April 1949. By this time domestic opposition had grown significantly:

The opposition of traditionally protectionist interests had been expected. What hurt the Charter more was the lack of support from the other side. Liberal trade interests found the Charter's prohibitions too weak. Some felt that the ITO was worse than nothing, arguing that the many ITO exceptions gave legitimacy to the very practices they hoped to prohibit. Underneath the specific criticism, there seems to have been a loss of faith in the postwar plan itself. Support for a grand enterprise like the Charter had little of the enthusiasm it might have had a few years earlier.<sup>53</sup>

The ITO's failure had serious repercussions for the GATT since the GATT had been drafted on the premise that an ITO would come into being. GATT was bound to become an instrument entirely different from the kind originally envisaged. As Jackson notes, "a pragmatic and sometimes groping attitude towards constitutional and legal structures was thus forced upon GATT, which found itself without an adequate legal and constitutional base

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<sup>51</sup> See Jackson, *World Trade*, *supra* note 9, at 49/50.

<sup>52</sup> See Press Release of December 6, 1950; *reprinted in* 23 U.S. Department of State Bulletin 977 (1950).

<sup>53</sup> See Hudec, *supra* note 20, at 59/60.

and required to fill a vacuum created by the failure of the ITO".<sup>54</sup> In 1955, the CONTRACTING PARTIES chose their regular Ninth Session to be a Review Session. An attempt was made to create a better institutional framework for the GATT. However, the agreement on an Organization for Trade Cooperation (OTC), although less detailed than the ITO, also failed to obtain the approval of the United States Congress and thus, like the ITO, the OTC failed to materialize.<sup>55</sup>

One of GATT's main features has been its sponsoring of trade negotiation rounds. The Preamble to the General Agreement urges the contracting parties to enter "... into reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and other barriers to trade and to the elimination of discriminatory treatment in international commerce". Article XXVIIIbis emphasizes that tariff negotiations are essential to the expansion of world trade and states that "the CONTRACTING PARTIES may therefore sponsor such negotiations from time to time". Indeed, the first five rounds held under GATT's aegis focused exclusively on the reduction of tariffs.<sup>56</sup> The sixth round, the Kennedy Round, also involved the negotiation of non-tariff measure obligations, but no important results were achieved in this area. Only one special side-agreement was negotiated, the 1967 Anti-dumping Code. The seventh round, named the Tokyo Round, mainly addressed the problem of non-tariff barriers to trade.<sup>57</sup> Its results included six 'Codes',<sup>58</sup> three sectoral agreements<sup>59</sup> and four 'Understandings'.<sup>60</sup> These achievements significantly broadened the

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<sup>54</sup> See Jackson, *World Trade*, supra note 9, at 50/51.

<sup>55</sup> See Jackson, supra note 34, at 37/38.

<sup>56</sup> See Jackson, supra note 34, at 52/53. These rounds were the first Geneva Round of 1947, the Annecy Round of 1949, the Torquay Round of 1950, the second Geneva Round of 1956, and the Dillon Round of 1960-1961.

<sup>57</sup> As a result of the seven rounds, tariffs were reduced to a level where they, in the view of many economists and businessmen, no longer form a meaningful barrier to imports. Already in the seventh round, the focus of attention shifted to non-tariff trade barriers. See Jackson, supra note 34, at 53.

<sup>58</sup> The six Tokyo Round Codes are the: (1) Agreement on Technical Barriers to Trade (or Standards Code); (2) Agreement on Government Procurement; (3) Agreement on Interpretation and Application of Articles VI, XVI and XXIII (or Subsidies Code); (4) Agreement on Implementation of Article VII (or Customs Valuation Code); (5) Agreement on Import Licensing Procedures; and (6) Agreement on Implementation of Article VI (or Anti-Dumping Code, the revised version of the 1967 Code).

<sup>59</sup> The three Tokyo Round sectoral agreements are the Arrangement regarding Bovine Meat, the International Dairy Arrangement, and the Agreement on Trade in Civil Aircraft.

scope of coverage of the GATT. This scope was further broadened by the Uruguay Round, the eighth Round, and the final one of its kind. The Uruguay Round, launched in September 1986 as the most ambitious round ever, was concluded in December 1993. In addition to negotiations on trade in goods, negotiations on trade in services and the protection of intellectual property rights were carried out, and in several areas previously negotiated rules were scrutinized and improved. The Uruguay Round was essentially a worldwide negotiation on the constitutional reform of the international trading system.<sup>61</sup> Arguably its most important result was the establishment, finally, of an official organization to oversee the functioning of the negotiated agreements. The Agreement establishing the World Trade Organization (WTO)<sup>62</sup> entered into force on 1 January 1995 (See ANNEX 1).<sup>63</sup>

The new General Agreement on Tariffs and Trade (GATT 1994), the General Agreement on Trade in Services (GATS), the Agreement on Trade-Related Aspects of Intellectual Property Rights, including Trade in Counterfeit Goods (TRIPs), the Dispute Settlement Understanding (DSU) and the Trade Policy Review Mechanism (TPRM), and all their associated legal instruments, are the main integral parts of the Agreement Establishing the WTO. The so-called Plurilateral Trade Agreements (PTAs) are integral parts of the WTO only for those Members that have accepted them.<sup>64</sup> GATT 1994 has three integral parts of its own. It consists of (1) GATT 1947, as amended, including tariff protocols, protocols of accession and waivers still in force, and other decisions of the CONTRACTING PARTIES to GATT 1947,

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<sup>60</sup> The four Understandings are Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries; Declaration on Trade Measures Taken for Balance-of-Payments Purposes; Safeguard Action for Development Purposes; and the Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance.

<sup>61</sup> See E.-U. Petersmann, 'The Uruguay Negotiations 1986-1991', in: E.-U. Petersmann and M. Hilf (eds.), *The New GATT Round of Multilateral Trade Negotiations* 501 (2nd. updated ed. 1991), p. 503.

<sup>62</sup> MTN/FA II, 15 December 1993.

<sup>63</sup> Canada was the first to propose the establishment of a WTO. See J.H. Jackson, 'Reflections on Restructuring the GATT', in: T. Oppermann and J. Molsberger (eds.), *A New GATT Round for the Nineties and Europe '92* (1991), p. 141. Its proposal was later endorsed by the European Community. See E.-U. Petersmann, 'Improvements to the Functioning of the GATT System including Dispute Settlement', in: T. Oppermann and J. Molsberger (eds.), *A New GATT Round for the Nineties and Europe '92* 109 (1991), p. 120. See also E.-U. Petersmann, 'Towards a New Multilateral Trading System and a New Trade Organization?', 45 *Aussenwirtschaft* 407 (1990), pp. 419-422.

<sup>64</sup> The PTAs do not create either obligations or rights for Members that have not accepted them. The four PTA's are the Agreement on Trade in Civil Aircraft, the Agreement on Government Procurement, the International Dairy Arrangement and the Arrangement Regarding Bovine Meat.



but excluding the Protocol of Provisional Application and provisions of protocols of accession concerning provisional application and providing that Part II of the GATT 1947 shall only be applied to the fullest extent not inconsistent with existing legislation;<sup>65</sup> (2) Seven Understandings;<sup>66</sup> and (3) the Uruguay Round Protocol. GATT 1994 is supplemented by twelve so-called side-agreements.<sup>67</sup> Together these agreements form the Agreements on Trade in Goods.

The WTO provides the common institutional framework for the conduct of trade relations among its Members. The principal body of the WTO is the Ministerial Conference. It is composed of representatives of all the Members and it shall meet at least once every two years. It is the Ministerial Conference which carries out the functions of the WTO and takes the necessary actions.<sup>68</sup> Its main subordinate body is the General Council, also composed of representatives of all Members. The General Council carries out the tasks of the Ministerial Conference in the intervals between its meetings.<sup>69</sup> It also convenes to discharge the responsibilities of the Dispute Settlement Body provided for in the DSU and, likewise, convenes to discharge the responsibilities of the Trade Policy Review Body provided for in the TPRM.<sup>70</sup> The General Council has seven principal subordinate bodies, three councils and four committees. The three councils are the Council for Trade in Goods, the Council for Trade

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<sup>65</sup> With the exception of mandatory legislation, enacted by a Member before it became a contracting party to GATT 1947, that prohibits the use, sale or lease of foreign-built or foreign-reconstructed vessels in commercial applications between points in national waters or the waters of an exclusive economic zone. The exemption only applies under certain circumstances and will be reviewed within five years of the entry into force of the WTO Agreement. This exemption enables the United States to maintain the so-called Jones Act.

<sup>66</sup> They are the: (1) Understanding on the Interpretation of Article II:(b); (2) Understanding on the Interpretation of Article XII and XVIII:B; (3) Understanding on the Interpretation of Article XVII; (4) Understanding on the Interpretation of Article XXIV; (5) Understanding on the Interpretation of Article XXV; (6) Understanding on the Interpretation of Article XXVIII; (7) Understanding on the Interpretation of Article XXXV.

<sup>67</sup> They are the: (1) Agreement on Agriculture; (2) Agreement on Sanitary and Phytosanitary Measures; (3) Agreement on Textiles and Clothing; (4) Agreement on Technical Barriers to Trade; (5) Agreement on Trade-Related Investment Measures; (6) Agreement on Implementation of Article VI; (7) Agreement on Implementation of Article VII; (8) Agreement on Preshipment Inspection; (9) Agreement on Rules of Origin; (10) Agreement on Import Licensing Procedures; (11) Agreement on Subsidies and Countervailing Measures; (12) Agreement on Safeguards.

<sup>68</sup> See Article IV:1 WTO.

<sup>69</sup> See Article IV:2 WTO.

<sup>70</sup> See Articles IV:3 and IV:4 WTO.

in Services, and the Council for Trade-Related Aspects of Intellectual Property Rights. Each council oversees the functioning of its respective Multilateral Trade Agreement(s). The four committees are the Committee on Trade and Development, the Committee on Balance-of-Payments Restrictions, the Committee on Budget, Finance and Administration, and the Committee on Trade and Environment.<sup>71</sup> Broadly speaking, the WTO has five specific functions.<sup>72</sup> Firstly, it facilitates the implementation, administration and operation of the WTO Agreement and furthers its objectives. Secondly, the WTO provides the forum for negotiations among its Members concerning their multilateral trade relations in matters dealt with under the current agreements, a forum for further negotiations, and a framework for the implementation of the results of such further negotiations. Thirdly, the organization administers the DSU. Fourthly, it administers the TPRM. Finally, in order to achieve greater coherence in global economic policy-making, the WTO cooperates with the IMF and the World Bank. It is clear that beyond the above-mentioned administrative functions, the establishment of a true world trade organization has further raised the political profile of trade.<sup>73</sup>

### *C. Origins and Objectives of the European Community*

The first serious attempts at trade liberalization on the European continent were made by Belgium, The Netherlands and Luxembourg. They became the first Western European countries to integrate their domestic economies by setting up a customs union between them. The Benelux Treaty was signed on 5 September 1944 and entered into force on 1 January 1948.<sup>74</sup> An even more ambitious project was suggested by the man who had deliberated with President Roosevelt on global economic cooperation after World War II. Winston Churchill advanced the idea of a more comprehensive European integration along federal lines. In an address at Zürich University, on 19 September 1946, he proposed to create "a kind of United States of Europe", whereby he referred to the need for a partnership between long-

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<sup>71</sup> See Articles IV:5 and IV:7 WTO. The establishment of the Committee on Trade and Environment took place in 1994. The Committee is not mentioned in the original WTO Agreement.

<sup>72</sup> See Article III WTO.

<sup>73</sup> See P.D. Sutherland, 'Global Trade - The Next Challenge', 49 *Aussenwirtschaft* 7 (1994), p. 9.

<sup>74</sup> See, e.g., F. Gay and P. Wagret, *Le Benelux* (1970), p. 6.

time enemies France and Germany. Indeed, the major political problem in Western Europe in the immediate post-war period was the negative attitude of the French towards the defeated enemy Germany. After the war had ended, the main objective of French foreign policy had been to obtain guarantees against a re-awakening of a German threat to French security. However, in the light of the growing hostility between East and West this policy appeared to be impossible. Soviet expansionism constituted a serious threat to Western Europe. The eastern part of Europe had already been brought within the Russian sphere of influence. The military coup of February 1948 in Czechoslovakia and the Berlin blockade from June 1948 to May 1949 had enhanced the fear considerably. NATO had been established to defend Western Europe but the alliance remained weak. An independent Germany, tied to the West, became a major political objective. For France, this objective seemed difficult to accept.<sup>75</sup>

In 1947, the United States had begun to provide financial aid under the so-called Marshall Plan to restore the economies of the European continent.<sup>76</sup> The American government insisted on a permanent organization to provide both a framework for this aid and for an economic co-operation based on elimination of trade barriers between the countries of Europe. This organization became the aforementioned OEEC. France greatly benefited from Marshall aid and gradually was pushed by the United States into agreeing to German recovery. Nevertheless, the sudden reversal of French policy toward Germany still came as a great surprise to Frenchmen and foreigners alike. On 9 May 1950, the French Foreign Minister Robert Schuman announced a plan to place the complete French and German coal and steel industry under the supervision of a High Authority, an institution composed of independent persons empowered to take decisions binding on France and Germany. This High Authority would be part of a supranational organization still to be established and into which the other countries of Western Europe would be invited to join.

The Schuman Plan, the basis of the European Communities, was an attempt to solve the 'German problem'. It was an attempt to achieve peace through economic cooperation. As Schuman himself declared when he presented the plan: "The solidarity in production thus established will make it plain that any war between France and Germany becomes not

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<sup>75</sup> See W. Diebold, *The Schuman Plan: A Study in Economic Cooperation 1950-1959* (1959), p. 10.

<sup>76</sup> Naturally, it was in the United States' own interest to increase its economic power by investing abroad. See Cassese, *supra* note 10, at 325.

merely unthinkable, but materially impossible".<sup>77</sup> Naturally, the United States government fully endorsed the plan. It had insisted on economic cooperation between the countries of Europe within the institutional framework of the OEEC and was pleased to see additional projects develop. The bold French initiative, however, did startle the American government. As 'eye-witness' William Diebold, then representative of the United States government, put it:

The basic situation seemed clear at the time. Europeans could expect American approval of any major step toward further integration of the European economy. That would be especially true of any major shift in the French approach to Germany, which had been regarded for some time as not only negative but failing, troublesome but really ineffective even in the eyes of those who had sympathized greatly with the situation the French found themselves in. Nevertheless, the French initiative was truly a surprise to the Americans. (The sense of surprise lasted for quite a while, something that does not always come out clearly in the historical papers).<sup>78</sup>

The bold French move turned out to be more than a mere *beau geste*.<sup>79</sup> Only a month after the Schuman Declaration a conference convened in Paris between the six countries which had subscribed to the principles of the French initiative: France, the German Federal Republic, Italy, Belgium, Luxembourg and the Netherlands. After nine months of negotiations, the Treaty establishing the European Coal and Steel Community (ECSC) was signed in Paris on 18 April 1951. It entered into force on 25 July 1952. The man who had drafted the Schuman Plan, Jean Monnet, a French businessman who had become an administrator in the French government, became the first President of the High Authority.

The Schuman Plan had not only envisaged an integration of the German and French coal and steel markets, but had also proposed European integration in other areas. Draft texts were prepared for two such endeavours: the Treaty establishing a European Defence Community (EDC) and the Statute for a European Political Community (EPC). Both attempts did not get beyond the initial stage and eventually failed. But other initiatives would follow. In December 1952 and February 1953, the Dutch Foreign Minister Beyen presented memoranda in which he drew the sketch for a future European common market. A joined Benelux memorandum of May 1955 followed up on this new initiative and suggested a conference to discuss the possibility of a collaboration in various areas, among others atomic energy, and

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<sup>77</sup> See the announcement of the proposal for a European Coal and Steel Community by Robert Schuman, 9 May 1950; Quoted from: J. Pinder, *Europe Against De Gaulle* (1963), p. 7.

<sup>78</sup> See W. Diebold, 'A Personal Note', in: K. Schwabe (ed.), *The Beginnings of the Schuman Plan* (1988), p. 24.

<sup>79</sup> See Diebold, *supra* note 75, at 9.

the establishment of a common market. In June 1955, the six Foreign Ministers of the ECSC countries met in Messina, Italy, to discuss the Benelux memorandum. It was decided that treaties would be drafted in the two designated areas. In July 1955, an Intergovernmental Committee under the leadership of the Belgian politician Paul-Henri Spaak began its task, specified in the Messina Resolution, to prepare the drafting of treaties in the indicated areas. In April 1956, the Spaak report was completed. It emphasized the need for the fusion of the domestic economies of the six participating States. In May 1956, the six Foreign Ministers convened again, this time in Venice, Italy. The Spaak Report was adopted as the basis for negotiation on treaties. After 10 months of difficult deliberations the Treaty establishing the European Economic Community (EEC) and the Treaty establishing the European Atomic Energy Community (Euratom) were signed in Rome on 25 March 1957. Precisely ten years after GATT, these treaties entered into force on 1 January 1958.

Although the EPC never came into existence, the desire for not just economic but also political integration remained alive. Influential leaders in the EC administration and in the various national administrations never ceased to reflect on how further integration could be achieved. Eventually, the Treaty on European Union (TEU) was signed in Maastricht on 7 February 1992. It entered into force on 1 November 1993. The Treaty on European Union, which provides an overall legal framework consisting of three pillars: the European Communities, a Common Foreign and Security Policy, and Justice and Home Affairs, is mainly a statement of political intent, that is to say, it states the intention to cooperate in the areas of foreign policy and defense policy and the intention to cooperate in the field of justice and home affairs. However, the TEU also provided for several important amendments to the central EEC Treaty (which was renamed EC Treaty). Most important are the new provisions that establish a time-table for progress towards economic and monetary union, the next phase of European economic integration.

#### *D. The Status of the European Communities in the WTO*

##### 1. The Compatibility of the Rome Treaty with GATT Law

From the very beginning, it had been clear that the ECSC Treaty was not compatible with Article XXIV of GATT concerning free-trade areas and customs unions and that the

compatibility of the EEC Treaty with this article was doubtful.<sup>80</sup> In respect of the ECSC Treaty a so-called waiver was granted, in November 1952.<sup>81</sup> However, the waiver did not unconditionally declare that the Six were entitled to depart from most-favoured-nation obligations in order to establish a common market. It emphasized the ECSC's basic objective of eliminating internal trade barriers and then, hesitantly, stated that "the realization of these aims, if accompanied by appropriate trade policies on the part of the Community, could benefit other contracting parties to the General Agreement".<sup>82</sup> Apparently, the CONTRACTING PARTIES were not so sure whether European economic integration was such a good idea. After the EEC Treaty was signed, the six Member States of the European Community also submitted this treaty to the GATT CONTRACTING PARTIES, in accordance with paragraph 7(a) of Article XXIV GATT.<sup>83</sup> On that occasion, EC representative Baron Snoy et d'Oppuers tried to reassure the other participants in GATT by solemnly declaring that "the firm assurance could be given that as long as the Six would remain contracting parties to the General Agreement they would scrupulously observe their obligations under the Agreement".<sup>84</sup> A committee installed by the CONTRACTING PARTIES examined the relevant provisions of the EEC Treaty and the General Agreement. After careful study of the reports submitted by various sub-groups, the Committee declared that these reports

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<sup>80</sup> For an in-depth analysis of the status of the EEC in GATT see G. Berrisch, *Der völkerrechtlicher Status der Europäischen Wirtschaftsgemeinschaft im GATT* (1992). See also K.W. Dam, 'Regional Economic Arrangements and the GATT: The Legacy of a Misconception', 30 U.Chi.L.Rev. (1963); E.L.M. Völker, *Barriers to External and Internal Community Trade* (1993), Ch. 1.

<sup>81</sup> See *Waiver Granted in Connection with the European Coal and Steel Community*, 10 November 1952, BISD 1S/17.

<sup>82</sup> See Diebold, *supra* note 75, at 526.

<sup>83</sup> See *The Treaties Establishing the European Economic Community and the European Atomic Energy Community*, BISD 6S/68ff. Article 7(a) GATT provides; "Any contracting party deciding to enter into a customs union or free-trade area, or an interim agreement leading to the formation of such a union or area, shall promptly notify the CONTRACTING PARTIES and shall make available to them such information regarding the proposed union or area as will enable them to make such reports and recommendations to contracting parties as they may deem appropriate". See also E.-U. Petersmann, 'Participation of the European Communities in the GATT: International Law and Community Law Aspects', in: D. O'Keefe and H.G. Schermers (eds.), *Mixed Agreements* 167 (1983), p. 184. The Euratom Treaty was submitted to the CONTRACTING PARTIES together with the EEC Treaty. Trade in nuclear products is covered by the EEC's common commercial policy and therefore the compatibility of the Euratom Treaty with GATT law did not have to be considered separately. See Petersmann, this note, at 190/191.

<sup>84</sup> Quoted from: E.-U. Petersmann, 'The EEC as a GATT Member - Legal Conflicts between GATT Law and European Community Law', in: M. Hilf, F.G. Jacobs and E.-U. Petersmann (eds.), *The European Community and GATT* 23 (1986), p. 34.

"contained no definite conclusions, because either the time at the disposal of the sub-groups or the information available did not permit such conclusions to be drawn".<sup>85</sup> Although the CONTRACTING PARTIES adopted the sub-group reports at their Twelfth Session, it was decided that further consideration of problems should be continued by the GATT Intersessional Committee. Unfortunately, this Committee also failed to reach any definite conclusions. The 1958 report by the Intersessional Committee stated that perhaps "it would be more fruitful if attention could be directed to specific and practical problems, leaving aside for the time being questions of law and debates about the compatibility of the Rome Treaty with Article XXIV of the General Agreement".<sup>86</sup> At their Thirteenth Session, the CONTRACTING PARTIES thus decided, *inter alia*, that:

(a) As many contracting parties considered that because of the nature of the Rome Treaty there were a number of important matters on which there was not at this time sufficient information to enable the CONTRACTING PARTIES to complete the examination of the Rome Treaty pursuant to paragraph 7 of Article XXIV, this examination and the discussion of the legal questions involved in it could not usefully be pursued at the present time.

(b) This postponement would clearly not prejudice the rights of the CONTRACTING PARTIES under Article XXIV.

(c) The CONTRACTING PARTIES welcomed the readiness of the members of the EEC to furnish further information pursuant to paragraph 7(a) of Article XXIV as the evolution of the Community proceeded.<sup>87</sup>

The question of the compatibility of the EEC Treaty with GATT law never has been resolved.<sup>88</sup> Since the Americans had pushed so hard for European stability through economic integration, it was hardly feasible for them to oppose the Treaty in GATT. However, serious doubts about compatibility of the Rome Treaty with GATT law lingered:

The formation of the European Community in 1958, .., marked a partial watershed. The United States put its shoulder to the wheel and saw the Common Market through, negotiating around the different hoops of Article XXIV, emasculating the Article somewhat so as to seek GATT approval of an imperfect union (especially in regard to discriminatory preferences for the eighteen ex-colonies in Africa that the Europeans insisted on retaining, requiring therefore a waiver of GATT rules), all in the cause of what it saw as a *politically* beneficial union of the original six nations that formed the Community.<sup>89</sup>

Still, when Article XXIV of GATT was drafted, the American negotiators had considered integration with less than 100% preferences as being clearly taboo. In the words of Clair

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<sup>85</sup> BISD 6S/69. See Petersmann, *supra* note 83, at 184.

<sup>86</sup> BISD 7S/70. See Petersmann, *supra* note 83, at 184.

<sup>87</sup> BISD 7S/71. See Petersmann, *supra* note 83, at 184/185.

<sup>88</sup> See Petersmann, *supra* note 83, at 185.

<sup>89</sup> See J.N. Bhagwati, *The World Trading System at Risk* (1991), pp. 69/70.

Wilcox, one of the leading United States trade negotiators at the time:

A customs union (with 100% preferences) creates a wider trading area, removes obstacles to competition, makes possible a more economic allocation of resources and thus operates to increase production and raise plains of living. A preferential system (less than 100%) on the other hand, retains internal barriers, obstructs economy in production, and restrains the growth of income and demand ... A customs union is conducive to the expansion of trade on a basis of multilateralism and non-discrimination; a preferential system is not.<sup>90</sup>

Article XXIV was therefore drafted with the purpose to avoid that it would become a justification for all kinds of preferential alignments of less than 100%.<sup>91</sup> The reason for including Article XXIV in the General Agreement at all seemed to have been that full, 100% integration had to be permitted since it possessed some kind of 'quasi-national status'. In addition, full integration could be considered a supplemental route to worldwide free trade, moving faster in those countries where their politics allowed it. Moreover, the rigidity of Article XXIV, it was generally maintained, would make it highly unlikely that countries would return to the discriminatory practices of the interwar period.<sup>92</sup> Article XXIV's clear ambiguity, however, has made this last belief a somewhat pious wish.<sup>93</sup> Starting with the European Communities in 1958, preferential trade arrangements of less than 100% have been condoned in GATT and it is often argued that they constitute a serious threat to multilateralism.<sup>94</sup> It would seem, however, that regional integration modelled on the example of European Community is the only way to achieve true global free trade in the 21st century. Crucial thereby is the will to follow the EC's example of increasing, deeper integration in various phases and the will to proceed with the lowering of barriers to external trade under the auspices of the WTO.

It is still debatable whether, and to what degree, the consistent GATT practice of acceptance towards the European Community has had law-creating effects that prevent other contracting parties from contesting the GATT compatibility of the Community.<sup>95</sup> Illustrative perhaps of

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<sup>90</sup> See C. Wilcox, *A Charter for World Trade* (1949), pp. 70-71. See also Bhagwati, *supra* note 89, at 65.

<sup>91</sup> See Bhagwati, *supra* note 89, at 66.

<sup>92</sup> *Ibid.*

<sup>93</sup> Article XXIV has been reviewed in the context of the Uruguay Round. See the 'Understanding on the Interpretation of Article XXIV'. For an account of the negotiations on this provision see Y. Devuyst, 'GATT Customs Union Provisions and the Uruguay Round: The European Community Experience', 26 J.W.T. 15 (1992), pp. 27-31.

<sup>94</sup> See Bhagwati, *supra* note 89, at 67.

<sup>95</sup> See Petersmann, *supra* note 83, at 180.



the continuing debate is the report of the GATT Working Party of 28 January 1983 on the accession of Greece to the Community. The report notes the opinion of two GATT contracting parties that the CONTRACTING PARTIES had never determined that the EEC Treaty, the agreements providing for the enlargement of the EEC in 1973 and the EEC's preferential agreements with certain non-Member States were compatible with the GATT and that "the compatibility of the Treaty of Rome itself with the provisions of the General Agreement remained an open question".<sup>96</sup> One may, perhaps, sympathize with the representative of the European Commission who peevishly replied that:

the European Communities did not share the view that these earlier treaties constituted an open question or that their legal status was unresolved in GATT since the CONTRACTING PARTIES had formulated no recommendations under Article XXIV:7(b) for any modifications to those arrangements. It was, however, always possible for any country to seek to resume discussions of these questions in another more appropriate context.<sup>97</sup>

European economic integration steadily progressed and the European Community now has a new goal: economic and monetary union. At least *quasi*-full economic integration was achieved with completion of the internal market program on 31 December 1992. It seems unlikely that the issue of compatibility of the EC Treaty with GATT law again will be raised in GATT.<sup>98</sup> On the other hand, the Community's preferential arrangements in respect of certain developing countries, the aftermath of the 'Imperial Preference' of several European countries, have certainly caused commotion in recent times. This commotion will be the topic of Part 2 of the present study.

## 2. WTO Membership and Internal Problems of Competence

The status of the Community as a GATT contracting party always has been uncertain,<sup>99</sup> but the issue itself has now been solved. Article XI of the WTO Agreement provides that: "The contracting parties to GATT 1947 as of the entry into force of this Agreement and the

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<sup>96</sup> *Ibid.*

<sup>97</sup> Quoted from Petersmann, *supra* note 83, at 186.

<sup>98</sup> As Devuyst notes: "In fact, to the degree that the Community has gone beyond the customs union stage, it has escaped the boundaries of Article XXIV". See Devuyst, *supra* note 93, at 34.

<sup>99</sup> Most commentators considered this membership a membership *sui generis*. See, e.g., Petersmann, *supra* note 83, at 173/174. M. Hilf, 'The Application of GATT Within the Member States of the European Community, with Special Reference to the Federal Republic of Germany', in: M. Hilf, F.G. Jacobs and E.-U. Petersmann (eds.), *The European Community and GATT* 153 (1986), p. 161.

European Communities (...) shall become original Members of the WTO". Although the membership issue itself has been solved, it is difficult to rightly assess the matter without looking at the problems of internal competence involved. Since the Member States of the European Community are also Members of the WTO, it is not immediately clear where the exact demarcation line between Community competence and Member State competence should be drawn. For that very reason, the European Commission asked the European Court of Justice, under Article 228(6) of the EC Treaty, to give an opinion on the issue. Opinion 1/94 was rendered on 15 November 1994.<sup>100</sup> Before examining the Opinion in some detail, a few preliminary observations on the Community competence to conclude international agreements are necessary.

Some modern national constitutions, such as, for example, the Basic Law of the Federal Republic of Germany, allocate *en masse* the power to conduct foreign relations to the federal level. The EC Treaty, however, follows the pattern of enumerated powers, that is to say, specific powers are allocated to the Community institutions while the non-allocated powers remain with the Member States.<sup>101</sup> The specific allocation of powers to Community institutions in the field of external relations concentrates on foreign commercial policy, implemented through both autonomous Community acts and international agreements. Articles 110 to 116, which pertain to the common commercial policy, divide the allocated powers between the Commission and the Council, wherein the Council has the authority of final decision. The European Parliament need only be consulted in specified cases.<sup>102</sup> Article 113 of the EC Treaty, the basic provision conferring powers on the Community with respect to commercial policy, does not actually define common commercial policy, but merely provides in paragraph 1 that "... the common commercial policy shall be based on uniform principles, particularly in regard to changes in tariff rates, the conclusion of tariff and trade agreements, the achievement of uniformity in measures of liberalisation, export policy and measures to protect trade such as those to be taken in case of dumping or subsidies".

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<sup>100</sup> See Opinion 1/94 of 15 November 1994 *Competence of the Community to conclude International Agreements concerning Services and the Protection of Intellectual Property*, not yet reported.

<sup>101</sup> See E. Stein, 'External Relations of the European Community: Structure and Process', in: *Collected Courses of the Academy of European Law*, Vol. 1, Book 1, 115 (1991), p. 132.

<sup>102</sup> The European Parliament does have more extensive powers in specific areas. It has, for example, power of assent in the field of accession and association agreements. See Article O of the TEU and Article 228(3) EC.

The scope of the Community powers depends on the definition of the concept of 'commercial policy' as used in Article 113 EC.<sup>103</sup> In Opinion 1/75, *Understanding on a Local Cost Standard*,<sup>104</sup> the Court made clear that this concept has "the same content whether it is applied in the context of the international action of a State or to that of the Community".<sup>105</sup> And in *Massey-Ferguson*,<sup>106</sup> it held that the proper functioning of the customs union justifies a wide interpretation of Article 113 and of the powers thereby conferred on the Community institutions to allow these institutions "thoroughly to control external trade by measures taken both independently and by agreement".<sup>107</sup> The Community's competence regarding commercial policy is exclusive. Member States may no longer unilaterally take autonomous measures in this area or enter into international agreements. In the view of the Court of Justice, "the provisions of Article 113 and 114 concerning the conditions under which, according to the Treaty, agreements on commercial policy must be concluded show clearly that the exercise of concurrent powers by the Member States and the Community in this matter is impossible".<sup>108</sup> According to Jacques Steenbergen, the exclusive nature of Community competence has not been seriously challenged since the first reactions to the *European Road Transport Agreement (ERTA)* judgment.<sup>109</sup> In *ERTA*, the Commission argued that since the Community had the power to develop an internal transport policy, it must also have the exclusive competence to negotiate an international transport agreement. Therefore, the Commission should be allowed to take over the negotiations. The Court agreed and stated that, although the Treaty does not expressly confer such power on the Community, its 'internal' competence to design a common transport policy carries with it treaty-making power in that area. The regulation previously adopted by the Council on the same subject, covering internal transport, necessarily empowered the Community to enter into any agreements with third countries relating to the subject-matter governed by that regulation. The Court further stated that "each time the Community, with a view to implementing a

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<sup>103</sup> See J. Steenbergen, 'The Common Commercial Policy', 17 C.M.L. Rev. 229 (1980), p. 230.

<sup>104</sup> Opinion 1/75 of 11 November 1975 *Understanding on a Local Cost Standard*, [1975] E.C.R. 1355.

<sup>105</sup> [1975] E.C.R. 1355, at 1362.

<sup>106</sup> Case 8/73 *Hauptzollamt Bremerhaven v. Massey-Ferguson*, [1973] E.C.R. 897.

<sup>107</sup> [1973] E.C.R. 897, at 908 (paragraph 4).

<sup>108</sup> [1975] E.C.R. 1355, at 1364.

<sup>109</sup> Case 22/70 *Commission v. Council*, [1971] E.C.R. 263. See Steenbergen, *supra* note 103, at 233.

common policy envisaged by the Treaty, adopts provisions laying down common rules, whatever form these may take, the Member States no longer have the right, acting individually or even collectively, to undertake obligations with third countries which affect those rules".<sup>110</sup>

Adopting the doctrine that Community treaty-making power is co-extensive with its internal powers, and that it applies to all areas of its internal domestic competence mentioned in Article 3 of the EC Treaty, the Court of Justice in effect rejected the principle of enumerated powers.<sup>111</sup> The Court buttressed its new doctrine of 'internal-external parallelism' by pointing to Article 210 of the Treaty which grants the Community its international personality.<sup>112</sup> In subsequent judgments, the Court clarified that the Community treaty power is not necessarily dependent on a prior internal measure, but may flow "by implication" directly from the Treaty provision creating the internal competence insofar as the participation of the Community in the international agreement is necessary for the attainment of one of the objectives of the Community.<sup>113</sup> As noted above, the Court held in its Opinion 1/75 that the exercise of concurrent powers by the Member States and the Community in matters of commercial policy is not possible. Member States cannot be allowed to adopt positions different from those which the Community intends to adopt, since to do so would "distort the institutional framework, call into question the mutual trust within the Community and prevent the latter from fulfilling its task in the defence of the common interest".<sup>114</sup> The exclusive nature of the Community's commercial policy power was confirmed by the *Donckerwolcke* judgment<sup>115</sup> in which the Court held that since full responsibility in the matter of commercial policy was transferred to the Community by means of Article 113, national measures of commercial policy are allowed, after the end of the

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<sup>110</sup> [1971] E.C.R. 263, at 274 (paragraph 17).

<sup>111</sup> See Stein, *supra* note 101, at 146.

<sup>112</sup> [1971] E.C.R. 263, at 274 (paragraphs 13 and 14). See Stein, *supra* note 101, at 147.

<sup>113</sup> Opinion 1/76 *Draft Agreement Establishing a European Laying-up Fund for Inland Waterway Vessels*, [1977] E.C.R. 741, at 755.

<sup>114</sup> [1975] E.C.R. 1355, at 1364.

<sup>115</sup> Case 41/76 *Suzanne Criel, née Donckerwolcke and Henri Schou v. Procureur de la Republique*, [1976] E.C.R. 1921.

transitional period, only by virtue of specific authorization by the Community.<sup>116</sup>

At the end of the Tokyo Round negotiations, a difference of opinion developed between the Commission and the Council as to whether the Tokyo Round agreements should be concluded by the Community alone, or jointly with the Member States. The Commission defended the opinion that the Community, on the basis of Article 113 of the EC Treaty and in the light of the case-law of the Court, had the authority to conclude the agreements without the Member States.<sup>117</sup> The Council, on the other hand, argued that in particular the Standards Code, the Government Procurement Code, and the Civil Aircraft Code transcended the field of commercial policy under Article 113 and that these agreements therefore should be concluded jointly by the Community and the Member States.<sup>118</sup> These differing opinions thus concerned the scope of the common commercial policy powers. The Council maintained that a commercial policy measure is a measure that aims at influencing the volume or flow of trade. In the Commission's view, however, a measure of commercial policy had to be assessed primarily by reference to its specific character as an instrument regulating international trade.<sup>119</sup> The Court's Opinion 1/78, *International Agreement on Natural Rubber*,<sup>120</sup> should have narrowed the gap between the views of both institutions.<sup>121</sup> In Opinion 1/78 the Court explained that in order to determine whether a subject matter falls under Article 113, one should look at its 'essential objective'. Although this point was now clarified, the Council and Commission did not change their views, but simply gave their own interpretations of the Court's reasoning to justify their unchanged positions.<sup>122</sup> Moreover, the political problems had not disappeared. Jean-Victor Louis has argued that the real problem was "saving face" for those Member States which had claimed that it was necessary

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<sup>116</sup> [1976] E.C.R. 1921, at 1937 (paragraph 32).

<sup>117</sup> Apart from the ECSC Tariff Protocol.

<sup>118</sup> See J.-V. Louis, 'The European Economic Community and the Implementation of the GATT Tokyo Round Results', in: J.H. Jackson, J.-V. Louis and M. Matsushita, *Implementing the Tokyo Round: National Constitutions and International Economic Rules* 21 (1984), pp. 36/37.

<sup>119</sup> See J.H.J. Bourgeois, 'The Common Commercial Policy - Scope and Nature of the Powers', in: E.L.M. Völker (ed.), *Protectionism and the European Community* (2nd. ed. 1987), p. 5.

<sup>120</sup> Opinion 1/78 *International Agreement on Natural Rubber*, [1979] E.C.R. 2871.

<sup>121</sup> See Louis, *supra* note 118, at 37.

<sup>122</sup> See Bourgeois, *supra* note 119, at 5.

for the Member States to participate in the conclusion of some agreements.<sup>123</sup> It was therefore finally decided that the ECSC Tariff Protocol, the Standards Code, and the Civil Aircraft Code should be concluded jointly with the Member States,<sup>124</sup> although it was difficult to justify this solution on pure legal grounds.<sup>125</sup>

The issue of exclusive or joint competence arose again with regard to the conclusion of the Agreement establishing the World Trade Organization and, in particular, its Annexes. The dispute between the Commission, on the one hand, and the Council and the Member States, on the other, did not so much pertain to the WTO Agreement itself nor even to the Agreements on Trade in Goods. It was mainly concerned with the GATS and the TRIPs Agreement. The institutional provisions of the WTO Agreement did not raise any competence problems of their own, since competence to participate in the institutional arrangements necessarily arises from the competence which exists in relation to the substantive provisions. There also was agreement on the fact that the Agreements on Trade in Goods were covered for the most part by the exclusive competence conferred on the Community in matters concerning the common commercial policy. Minor points of divergence related to ECSC products, the Agreement on Technical Barriers to Trade, and the need for Article 43 EC as the proper legal basis for conclusion of the Agreement on Agriculture and the Agreement on the Application of Sanitary and Phytosanitary Measures. The main issue, however, was the Commission's contention that the conclusion of both GATS and the TRIPs Agreement fell within the exclusive competence conferred on the Community by Article 113 EC. This contention was strongly disputed by the Council and the Member States.

The Court of Justice refused to accept any competence of the Member States with respect to the Agreements on Trade in Goods. As regards ECSC products, the argument put forward by the Council and the Member States that Article 71 ECSC confers competence on the Member States by providing that "the powers of the Governments of the Member States in matters of commercial policy shall not be affected by this Treaty" was rejected by the Court

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<sup>123</sup> See Louis, *supra* note 118, at 37.

<sup>124</sup> See J.H.J. Bourgeois, 'The Tokyo Round Agreements on Technical Barriers and on Government Procurement in International and EEC Perspective', 19 C.M.L. Rev. 5 (1982), p. 21. See also Louis, *supra* note 118, at 38.

<sup>125</sup> See Petersmann, *supra* note 83, at 183. See Bourgeois, *supra* note 119, at 22. See Louis, *supra* note 118, at 38.

on the grounds that Article 71 ECSC could only have been intended to refer to coal and steel products. It could have conferred competence on the Member States only as regards agreements relating specifically to ECSC products. The Community has exclusive competence to conclude international agreements of a general nature such as the WTO Agreement and its Annexes, even though these agreements also pertain to coal and steel products.<sup>126</sup> The contention that Article 43 of the EC Treaty had to be viewed as the proper legal basis for the Council's decision to conclude the WTO Agreement and its Annexes in respect of the agreements on agriculture and sanitary and phytosanitary measures, since these agreements particularly concern the internal rules on the organization of agricultural markets, also was rejected by the Court. In the view of the Court, both agreements were confined to the establishment of international commitments and could have been concluded on the basis of Article 113 alone.<sup>127</sup> The Dutch government's claim that the Agreement on Technical Barriers to Trade should have been concluded jointly, since the Member States continue to have competence by reason of the nature of certain directives and because complete harmonization has not been achieved and is not envisaged in the field of technical barriers to trade, was rejected as well. In the view of the Court, the Agreement on Technical Barriers is an agreement merely designed to ensure that technical standards and regulations do not unnecessarily interfere with international trade. It thus falls within the ambit of the common commercial policy.<sup>128</sup>

The Court took a different view with respect to GATS and TRIPs. It did not agree with the Commission's contention that the conclusion of both GATS and TRIPs fell within the common commercial policy. As regards GATS, the Commission had argued, *inter alia*, that there was no need to distinguish between the different modes of supply of services, and between the cross-frontier supply of services and the supply of services through a commercial presence in the country of the person to whom they are supplied. The Court, however, held that only the cross-frontier supply of services is covered by Article 113, since it is not unlike trade in goods and no particular reason existed why such a supply should not fall within the concept of the common commercial policy. However, the other three modes of supply covered by GATS (consumption abroad, commercial presence and the presence of natural

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<sup>126</sup> Paragraphs 25-27 of Opinion 1/94.

<sup>127</sup> Paragraphs 28-31 of Opinion 1/94.

<sup>128</sup> Paragraphs 32-33 of Opinion 1/94.

persons) are not covered by this concept. The Court thus concluded that the Community and the Member States are jointly competent to conclude GATS.<sup>129</sup>

As regards the TRIPs Agreement, the Commission had argued that it had exclusive competence since the rules concerning intellectual property rights are immediately linked to trade in the products and services to which these rules apply. The Court only partly agreed with its point of view. Evidently, measures to be taken by the customs authorities at the external frontiers of the Community may be adopted on the basis of Article 113 alone and agreements pertaining to such matters are to be concluded by the Community alone. The release into free circulation of counterfeit goods, the topic of Section 4 of Part III TRIPs, clearly concerns such a matter. However, as regards the other matters dealt with in the TRIPs Agreement there should be joint competence. Intellectual property rights affect internal trade just as much as, if not more than, international trade.<sup>130</sup> The concern that problems might arise regarding the administration of GATS and TRIPs due to the shared competence of the Community and the Member States could not change the Court's position. The Member States and the Community institutions are under the obligation to cooperate in these matters:

where it is apparent that the subject-matter of an agreement or convention falls in part within the competence of the Community and in part within that of the Member States, it is essential to ensure close cooperation between the Member States and the Community institutions, both in the process of negotiation and conclusion and in the fulfillment of the commitments entered into. That obligation to cooperate flows from the requirement of unity in the international representation of the Community.<sup>131</sup>

Jacques Bourgeois has argued convincingly that Opinion 1/94 signifies a 'step back' in several respects. For example, in Opinion 1/75 the Court held that the concept of commercial policy has the same content whether it is applied in the context of the international action of a State or to that of the Community. Can it be seriously maintained that the negotiation with a third country of an agreement on the exchange of air traffic rights, or on the mutual protection of intellectual property rights, is not part of a State's commercial policy?<sup>132</sup> Just when virtually all States have drawn the obvious conclusion from the fundamental changes in the nature and structure of international economic relations, and have acknowledged that

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<sup>129</sup> Paragraphs 36-53 of Opinion 1/94.

<sup>130</sup> Paragraphs 54-71 of Opinion 1/91.

<sup>131</sup> Paragraph 108 of Opinion 1/91.

<sup>132</sup> See J.H.J. Bourgeois, 'The EC in the WTO and Advisory Opinion 1/94: An Echtermach Procession', 32 C.M.L. Rev. 763 (1995), pp. 779/780.



services and (certain aspects of) intellectual property rights are to be subjected to multilateral rules, the Court takes the position that these matters are for the Member States to decide and are not part of the common commercial policy.<sup>133</sup> Furthermore, the duty to cooperate within the WTO will prove to be an obligation difficult to implement: how can the cacophony be avoided?<sup>134</sup> Opinion 1/94 signifies an apparent break with previous case-law in the area of external relations; a break which only can be explained by the combined opposition of the Council, the European Parliament and eight of the (then) twelve Member States.<sup>135</sup> Bourgeois has argued that Opinion 1/94 is an example of the 'return to minimalism' already announced by former Judge Koopmans in 1986.<sup>136</sup> Indeed, as other cases in this study will indicate, the Court of Justice seems to have retreated into a comfortable position on the sideline, while the game between Council/Member States and Commission continues. Not quite the proper position for a referee who wants to be taken seriously.

### E. Conclusion

As noted, the Schuman Plan was devised by Jean Monnet. In January 1946, Monnet had been appointed President of the *Commissariat au Plan* with the assignment to modernize the French economy in order to prepare it for participation in the new liberal international trading system under the auspices of GATT.<sup>137</sup> He was well aware of the basic objectives underlying the GATT and proposed a similar endeavour on a more confined, regional level. Like Cordell Hull, Jean Monnet strongly believed in economic cooperation as a vehicle for peace and prosperity. The 1950 Schuman Plan was both a political attempt to prevent yet another war on the European continent and an economic initiative to make Europe prosperous by establishing a common market. The Preamble to the ECSC Treaty reflects this dual objective by referring, *inter alia*, to the determination of the Six "to substitute for age-old rivalries the merging of their essential interests; to create, by establishing an economic

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<sup>133</sup> See Bourgeois, *supra* note 132, at 785.

<sup>134</sup> See Bourgeois, *supra* note 132, at 784.

<sup>135</sup> See Bourgeois, *supra* note 132, at 786.

<sup>136</sup> See Bourgeois, *supra* note 132, at 186.

<sup>137</sup> See F. Lynch, 'The Role of Jean Monnet in Setting up the European Coal and Steel Community', in: K. Schwabe (ed.), *The Beginnings of the Schuman Plan* (1988), p. 117.

community, the basis for a broader and deeper community among peoples long divided by bloody conflicts". From the very beginning, the objectives of the European Community have been more ambitious perhaps than those envisaged under GATT and the WTO. Nevertheless, these objectives were based on the very same political ideals and basic economic propositions, namely peace and prosperity through economic cooperation on a non-discriminatory basis.

The establishment of the WTO should have been the occasion for the EC to present itself as a true entity, as a unit, but instead it insisted on membership of the Member States as well as membership of the Community. It appears to be difficult for the Court to overcome the 'institutional pressures' which are so typical for the European Community. As William Diebold has observed, "the GATT relation has put the Community in a world setting as no other aspect of its activities has. The interplay of the regional and supranational entity with the global and intergovernmental one has been important to the Community and has had effects on its internal character as well as its external appearance".<sup>138</sup> The interplay and its effects will be further analyzed in Part 2 of this study. First, however, Part 1 will provide an analysis of the current status of GATT law in the legal order of the European Community.

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<sup>138</sup> See Diebold, *supra* note 75, at 532.

**PART 1**

***THE STATUS OF GATT IN EUROPEAN COMMUNITY LAW***



### III

#### *The Direct Application of GATT*

##### *A. Introduction*

AS the EC Treaty does not stipulate how international agreements penetrate the Community legal system, the viewpoint of the Court of Justice on this matter needs to be examined. Does the Court recognize the international norm as such as a source of law, that is, does the international norm, as it stands, constitute a criterion of validity, or can it be applied only after having been transformed into a rule of Community law? Description of how GATT is incorporated into the Community legal system - is GATT directly applicable or not? - provides a first indication of the extent to which the GATT is accepted by the Community. In the following sections, reference will first of all be made to the incorporation of Community law into the legal systems of the Member States and, in particular, which method of incorporation was chosen by the Court of Justice and why. Subsequently, the incorporation of international agreements 'in general' into the Community legal order will be examined and, finally, the incorporation of the international agreement called the GATT. For which system did the Court opt and what were the reasons? The EC Treaty stipulates that international agreements concluded by the Community are binding on the Community and the Member States. Is their incorporation therefore different from the incorporation of an agreement such as GATT 1947, which was not concluded by the Community itself? And, how is GATT 1994 incorporated into the legal system of the European Community?

##### *B. The Direct Application of Community Law*

As regards the relationship between the law of the Member States and Community law, the case-law of the Court of Justice reflects a monist approach.<sup>1</sup> In the well-known *Van Gend &*

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<sup>1</sup> See, e.g., H.G. Schermers and D. Waelbroeck, *Judicial Protection in the European Communities* (1992), pp. 123 and 126.

*Loos Case*,<sup>2</sup> the Court ruled that "... the Community constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only Member States but also their nationals".<sup>3</sup> Subsequently, in *Costa v. ENEL*,<sup>4</sup> the Court clarified that "by contrast with ordinary international treaties, the EEC Treaty has created its own legal system which, on the entry into force of the Treaty, became an *integral part* of the legal systems of the Member States and which their courts are bound to apply".<sup>5</sup> It follows from these judgments that in the Court's view Community law must apply as such in the territory of a Member State, merely as a result of the entry of that Member State into the Community. No transformation into national law is required or even allowed.<sup>6</sup> Upon entry into the Community, the Member States accepted the Community legal order. The Court's claim is buttressed by Article 5 of the EC Treaty which provides that the Member States "shall take all appropriate measures, ..., to ensure fulfilment of the obligations arising out of this Treaty or resulting from action taken by the institutions of the Community".

Another example of the Court's attitude, clarifying the reasoning as to why Community law must necessarily form an integral part of the national legal systems, is the *Wilhelm Case*.<sup>7</sup> In this judgment, the Court first of all reaffirmed that the EC Treaty established its own system of law integrated into the legal systems of the Member States which must be applied by the national courts. It then went on to explain that it would be contrary to the nature of the Community legal system to allow Member States to introduce or maintain measures capable of prejudicing the practical effectiveness of the EC Treaty. It concluded by stating that "the binding force of the Treaty and of measures taken in application of it must not differ from one State to another as a result of internal measures, lest the functioning of the Community system should be impeded and the achievement of the aims of the Treaty placed in peril".<sup>8</sup>

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<sup>2</sup> Case 26/62 *Algemene Transport- en Expeditie Onderneming van Gend en Loos v. Nederlandse administratie der belastingen*, [1963] E.C.R. 1.

<sup>3</sup> [1963] E.C.R. 1, at 12.

<sup>4</sup> Case 6/64 *Costa v. ENEL*, [1964] E.C.R. 585.

<sup>5</sup> [1964] E.C.R. 585, at 593 (emphasis added).

<sup>6</sup> See Schermers and Waelbroeck, *supra* note 1, at 126.

<sup>7</sup> Case 14/68 *Walt Wilhelm v. Bundeskartellamt*, [1969] E.C.R. 1.

<sup>8</sup> [1969] E.C.R. 1, at 14 (paragraph 6).

Indeed, the fact that Community law forms an integral part of the legal systems of the Member States has important consequences. If it did not, the Court of Justice would hardly have control over its application and Community law would undoubtedly vary considerably from State to State. The mandate<sup>9</sup> that Italy gave to its judges is very different from the mandate the French judges received. It is clear that the dualist view of the relationship between domestic and international law "cannot do justice to the legal phenomenon of the Communities".<sup>10</sup> In one State a judge would always have to respect Community law, even if later domestic legislation were contrary to it, while in the other he would not be required to do so. This would, of course, be catastrophic for the Community and its objectives.<sup>11</sup>

For this reason, the procedure of Article 177 of the EC Treaty is an indispensable instrument for the Court of Justice. Under Article 177 EC, the Court of Justice has jurisdiction to give preliminary rulings on the interpretation of the Treaty and the validity and interpretation of acts of the Community institutions.<sup>12</sup> The provision's main function is to ensure the uniform application of Community law in the national legal systems of the Member States. Or, as the Court ruled in the *Rheinmühlen Case*,<sup>13</sup> "Article 177 is essential for the preservation of the Community character of the law established by the Treaty and has the object of ensuring that in all circumstances this law is the same in all States of the Community".<sup>14</sup> Article 177 is an important mechanism for the integration of Community law with domestic law and for uniformity throughout the whole Community. It is an "instrument of understanding" between

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<sup>9</sup> The term 'mandate' is used in this context by Van Panhuys; see H.F. Van Panhuys, 'Relations and Interactions Between International and National Scenes of Law', 112 RdC 7 (1964), p. 9.

<sup>10</sup> See Ch. Sasse, 'The Common Market: Between International and Municipal Law', 75 Yale L.J. 695 (1966), p. 725.

<sup>11</sup> See Sasse, *supra* note 10, at 726/727.

<sup>12</sup> Article 177 of the EC Treaty provides, *inter alia*, that: "The Court of Justice shall have jurisdiction to give preliminary rulings concerning: (a) the interpretation of this Treaty; (b) the validity and interpretation of acts of the institutions of the Community".

<sup>13</sup> Case 146/73 *Rheinmühlen-Düsseldorf v. Einfuhr- und Vorratstelle für Getreide und Futtermittel*, [1974] E.C.R. 139.

<sup>14</sup> [1974] E.C.R. 139, at 147. See also Case 16/65 *Firma C. Schwarze v. Einfuhr- und Vorratstelle für Getreide und Futtermittel*, [1965] E.C.R. 877, at 886: Article 177 has "... the aim of ensuring that Community law is applied in a unified manner...". In *Van Gend & Loos*, the Court had already stated that "the task assigned to the Court of Justice under Article 177, the object of which is to secure uniform interpretation of the Treaty by national courts and tribunals, confirms that the states have acknowledged that Community law has an authority which can be invoked by their nationals before those courts and tribunals"; [1963] E.C.R. 1, at 12.

the national courts and the Court of Justice and indeed an instrument indispensable for a development towards a common law of the European Community.<sup>15</sup> It is clear that if the ECJ had not taken the monist approach, this instrument of understanding would have been useless.

### *C. The Direct Application of International Agreements*

The *Haegeman* judgment<sup>16</sup> may serve to illustrate that the Court of Justice also regards the relationship between international law and Community law as monist. The *Haegeman* Case concerned a reference for a preliminary ruling by a Brussels court. In the proceedings before this tribunal, the company R. & V. Haegeman (chiefly importers of Greek wine), claimed repayment of countervailing duties imposed on it by the Belgian customs authorities on the basis of Council Regulation 816/70 "laying down additional provisions for the common organization of the market in wine". Before the adoption of this regulation, imports of Greek wine into Benelux territory had not been subject to any customs duties or to any quantitative restrictions. According to Haegeman, the imposition of the charges by the Belgian authorities infringed provisions of the Association Agreement between the Community and Greece which accorded equal treatment. Therefore, the company argued, imports of Greek wines should not be subject to tariffs or charges having equivalent effect. In his Opinion, Advocate General Warner decided against jurisdiction of the Court of Justice to interpret the Association Agreement. He argued that the jurisdiction of the Court under Article 177 is to rule on the interpretation of the Treaty and on the validity and interpretation of acts of the Community institutions. In the view of the Advocate General, the Court did not have, under Article 177, direct jurisdiction to rule on the interpretation of an international agreement such as the Agreement of Association with Greece. The Court's jurisdiction to interpret this agreement could only arise where interpretation was relevant to the question of the validity of an act of a Community institution or to the question of the interpretation to be given to such an act. Therefore, the questions asked by the Brussels Tribunal could only be considered admissible in so far as they concerned the question of the validity and effect of Regulation

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<sup>15</sup> See D. Lasok and J.W. Bridge, *Law and Institutions of the European Communities* (5th ed. 1991), p. 356.

<sup>16</sup> Case 181/73 R. & V. *Haegeman v. Belgian State*, [1974] E.C.R. 449.



No. 816/70 and of the Community legislation implementing it.<sup>17</sup> The Court, however, did not agree. It based its jurisdiction directly on the text of Article 177, arguing that since, under the first paragraph of Article 177 of the EC Treaty, the Court of Justice has jurisdiction to give preliminary rulings concerning the interpretation of acts of the institutions of the Community, and the Association Agreement was concluded by the Council under Articles 228 and 238 of the EC Treaty, the agreement was, insofar as the Community was concerned, an act of one of the institutions of the Community within the meaning of Article 177. Subsequently, the Court made another very important observation. It held that the provisions of the Association Agreement "from the coming into force thereof, form an integral part of Community law". Accordingly, the Court argued, it has, within the framework of this law, jurisdiction to give preliminary rulings concerning the interpretation of that agreement.<sup>18</sup>

In *Haegeman*, the Court of Justice assimilated the acceptance of an international agreement to an act performed by an institution of the Community in terms of Article 177(1)(b).<sup>19</sup> In the view of Hartley, its reasoning was "rather suspect".<sup>20</sup> The Court should have taken into account the fact that the provision in question was contained in the Association Agreement and not in the Community act. One cannot ignore, Hartley argues, the regulation or decision of the Council by means of which the Community concludes international agreements and then assert that the agreement itself is a Community act within Article 177(1)(b). Such reasoning confuses a unilateral act with a bilateral act and the former is surely what the drafters of Article 177 had in mind. Moreover, he concludes, Article 177(1)(b) refers to acts of the institutions of the Community, not to acts of the Community. The regulation or decision is an act of an institution, but the agreement itself is concluded between the Community and the other contracting party.<sup>21</sup> Hartley, however, seems to hold the minority

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<sup>17</sup> [1974] E.C.R. 449, at 472/473.

<sup>18</sup> [1974] E.C.R. 449, at 459/460 (paragraphs 2-6).

<sup>19</sup> See E.-U. Petersmann, 'Application of GATT by the Court of Justice of the European Communities', 20 C.M.L.Rev. 397 (1983), p. 398.

<sup>20</sup> See T.C. Hartley, 'International Agreements and the Community Legal System: Some Recent Developments', 8 E.L.Rev. 383 (1983), p. 391.

<sup>21</sup> *Ibid.*

view. The majority of commentators appears to have accepted the Court's reasoning.<sup>22</sup> As the Court decided in the final phrases of its judgment, the provisions of the Association Agreement form an integral part of the Community legal system. In other words, just as Community law is integrated into the legal systems of the Member States, international agreements concluded by the Community are integrated into the Community legal system. Therefore, the conclusion of an international agreement by the Council, together with the publication of the act of conclusion and the text of the agreement in the Official Journal, are "the very basis from which effects flow" for the Community as such and for the Member States.<sup>23</sup> The importance of the observation that international agreements concluded by the Community form an integral part of Community law may not be underestimated. It means that these agreements are to be viewed as being an integral part of the law applicable inside the Community, and thus an integral part of the legal rules under which the Court exerts control over the activities of both Member States and Community institutions.<sup>24</sup> As stated previously, it follows that international agreements concluded by the Community enter *as such* into the legal order of the Community. In other words, no particular act of transformation is required.<sup>25</sup> The relationship between international law and Community law is monist.

The Court of Justice reconfirmed and clarified its *Haegeman* ruling in the *Kupferberg* Case.<sup>26</sup> The background of this case was as follows. When, in August 1976, the German importer Christian Adalbert Kupferberg cleared through customs a consignment of port wines from

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<sup>22</sup> See, e.g., Petersmann, *supra* note 19, at 435; Schermers and Waelbroeck, *supra* note 1, at 171. As Bourgeois notes, in EC practice the 'conclusion' of an international agreement, within the meaning of the relevant Treaty provisions, should be viewed as covering simultaneously two different measures; the measure whereby the internal procedure to conclude an agreement is completed and the measure whereby the Community binds itself internationally. See J.H.J. Bourgeois, 'International Jurisprudence and Domestic Law: Some Comments From A European Community Perspective', paper presented at the 8th Court of International Trade Judicial Conference, New York, 28 October 1992, p. 8.

<sup>23</sup> See P. Pescatore, 'Treaty-making by the European Communities', in: F.G. Jacobs and S. Roberts (eds.), *The Effect of Treaties in Domestic Law* 171 (1987), p. 179.

<sup>24</sup> See Pescatore, *supra* note 23, at 180.

<sup>25</sup> See Petersmann, *supra* note 19, at 398. Cf. G. Bebr, 'Agreements Concluded by the Community and their Possible Direct Effect: From International Fruit Company to Kupferberg', 20 C.M.L.Rev. 35 (1983), p. 39. Cf. J.H.J. Bourgeois, 'Effects of International Agreements in European Community Law: Are the Dice Cast?', 82 Mich. L. Rev. 1250 (1984), p. 1257.

<sup>26</sup> Case 104/81 *Hauptzollamt Mainz v. C.A. Kupferberg & Cie.*, [1982] E.C.R. 3641.

Portugal, a monopoly equalization duty was levied by the Hauptzollamt Mainz. Under the German Law on the Monopoly in Spirits, such a monopoly equalization duty is levied on imported spirits and spirit products. Port wines are regarded as liqueur wines, and liqueur wines with an alcohol content of more than 14% by volume are considered to be spirit products. The monopoly equalization duty was to be calculated in respect of such wines according to the quantity of alcohol in excess of 14% by volume. The monopoly equalization duty corresponds to the spirits surcharge levied on national spirits exempt from an obligation to deliver to the monopoly. The Law on the Monopoly in Spirits, however, provided for a reduction of 21% in this surcharge in respect of domestic spirits produced in limited quantities by certain national distilleries. Kupferberg contested the imposition of the duty and brought an action before the Finanzgericht Rheinland-Pfalz. This court granted the reduction on the basis, *inter alia*, of Article 21(1) of the EC - Portugal Agreement, which provides that "the Contracting Parties shall refrain from any measures or practice of an internal fiscal nature establishing, whether directly or indirectly, discrimination between the products of one Contracting Party and like products originating in the territory of the other Contracting Party". In the view of the Finanzgericht, imported port wines were comparable with national liqueur wines. Upon appeal by the Hauptzollamt, the Bundesfinanzhof decided to seek a preliminary ruling from the European Court of Justice. In its judgment, the Court first referred to Article 228, according to which international agreements concluded by the Community are binding on the institutions of the Community and on Member States. Therefore, the Court argued, the Community institutions and the Member States must ensure compliance with the obligations arising from such agreements, since:

in ensuring respect for commitments arising from an agreement concluded by the Community institutions the Member States fulfil an obligation not only in relation to the non-member country concerned but also and above all in relation to the Community which has assumed responsibility for the due performance of the agreement. That is why the provisions of such an agreement, as the Court has already stated in *Haegeman*, form an integral part of the Community legal system.<sup>27</sup>

In other words, the Court realizes that when the Community assumes obligations towards a third State, the performance of such obligations may often fall within the competence of the Member States. Therefore, the Community must rely on the Member States to assure the fulfilment of its obligations towards the other party. This is a duty owed to the Community and enforcement through the mechanism of Article 169 is not inconceivable.<sup>28</sup> The Court

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<sup>27</sup> [1982] E.C.R. 3641, at 3662 (paragraph 13).

<sup>28</sup> See *Bebr*, *supra* note 25, at 43.

then explained the consequences of this important observation:

it follows from the Community nature of such provisions that their effect in the Community may not be allowed to vary according to whether their application is in practice the responsibility of the Community institutions or of the Member States and, in the latter case, according to the effects in the internal legal order of each Member State which the law of that State assigns to international agreements concluded by it. Therefore it is for the Court, within the framework of its jurisdiction in interpreting the provisions of agreements, to ensure their uniform application throughout the Community.<sup>29</sup>

The Court of Justice gave a further account of its reasoning in the *Demirel* Case.<sup>30</sup> The facts of this case should be briefly summarized. On 17 March 1983, Mrs. Meryem Demirel, a Turkish national, entered the Federal Republic of Germany together with her son for the purpose of rejoining her husband who had lived there since 1979. Her visa, however, was not issued for family reunification and only valid until 9 June 1984. After expiry of the visa, Mrs. Demirel did not return to Turkey but stayed in Germany. When, on 25 May 1985, the City of Schwäbisch Gmünd ordered her to leave the country, she lodged an objection against this decision, which was rejected by the competent organ, the Regierungspräsidium Stuttgart, on 9 July 1985. Subsequently, she brought an action before the Verwaltungsgericht Stuttgart for the annulment of the decisions of 25 May and 9 July 1985. This court decided to refer questions to the Court of Justice for a preliminary ruling, since in its opinion the matter involved an interpretation of the Association Agreement between the Community and Turkey. Before the Court of Justice, the German Government and the United Kingdom challenged the jurisdiction of the Court to interpret the Association Agreement. In the case of a mixed agreement, they argued, the Court's jurisdiction does not cover an area which falls within the exclusive competence of the Member States, such as the free movement of workers from third States. The Community Court, however, simply referred to the *Haegeman* judgment and held that:

an agreement concluded by the Council under Articles 228 and 238 of the Treaty is, as far as the Community is concerned, an act of one of the institutions of the Community within the meaning of Article 177(1)(b), and, as from its entry into force, the provisions of such an agreement form an integral part of the Community legal system; within the framework of that system the Court has jurisdiction to give preliminary rulings concerning the interpretation of such an agreement.<sup>31</sup>

However, this statement did not yet solve the issue. The Association Agreement could be viewed as an act of a Community institution only to the extent the rights and obligations of the Community were involved. It seems to be the general view that the Court of Justice

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<sup>29</sup> [1982] E.C.R. 3641, at 3662/3663 (paragraph 14)

<sup>30</sup> Case 12/86 *Meryem Demirel v. Stadt Schwäbisch Gmünd*, [1987] E.C.R. 3719.

<sup>31</sup> [1987] E.C.R. 3719, at 3750 (paragraph 7).

cannot interpret provisions of a mixed agreement which range under the competence of the Member States.<sup>32</sup> The Court's interpretation of Article 238, however, settled the matter, at least for the time being. In the Court's view, Article 238 was legally a sufficient basis for the Community to include in association agreements with non-member States rules concerning the free movement of workers. It held that:

Since the agreement in question is an association agreement creating special, privileged links with a non-member country which must, at least to a certain extent, take part in the Community system, Article 238 must necessarily empower the Community to guarantee commitments towards non-member countries in all the fields covered by the Treaty. Since freedom of movement for workers is, by virtue of Article 48 et seq. of the EEC Treaty, one of the fields covered by that Treaty, it follows that commitments regarding freedom of movement fall within the powers conferred on the Community by Article 238. Thus the question whether the Court has jurisdiction to rule on the interpretation of a provision in a mixed agreement containing a commitment which only the Member States could enter into in the sphere of their own powers does not arise.<sup>33</sup>

But even authors who supported a broad interpretation of the association concept would not have included in it the access of non-Member nationals to the Community territory because entry and residence of aliens is usually considered as important as prime security interests of national governments.<sup>34</sup> The jurisdiction of the Court, however, could not be challenged on the ground that the Member States were to implement the agreement internally and not the Community institutions. Reiterating the 'Kupferberg-formula', the Court stated that "in ensuring respect for commitments arising from an agreement concluded by the Community institutions the Member States fulfil, within the Community system, an obligation in relation to the Community, which has assumed responsibility for the due performance of the agreement".<sup>35</sup>

The *Sevince Case*<sup>36</sup> provides us with an example of why, in the opinion of the Court of Justice, even decisions by organs set up under international agreements which bind the Community must be considered an integral part of the Community legal order. On 22 February 1979, Mr. S.Z. Sevince, a Turkish national, was granted a residence permit in the Netherlands, on the ground that he had married a (Turkish) national resident. When he

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<sup>32</sup> See G. Nolte, 'Annotation Case 12/86', 25 C.M.L.Rev. 403 (1988), p. 407.

<sup>33</sup> [1987] E.C.R. 3719, at 3751 (paragraph 9).

<sup>34</sup> See E. Stein, 'External Relations of the European Community: Structure and Process, in: *Collected Courses of the Academy of European Law* 115 (1991), p. 154.

<sup>35</sup> [1987] E.C.R. 3719, at 3751 (paragraph 11).

<sup>36</sup> Case C-192/89 *S.Z. Sevince v. Staatssecretaris van Justitie*, [1990] E.C.R. I-3461.

applied for an extension of his permit, the competent Dutch authority, the *Staatssecretaris van Justitie* rejected the application, because Mr. and Mrs. Sevince had separated and therefore the family circumstances on the basis of which the residence permit had been issued no longer existed. Under Article 38 of the Dutch Aliens Law, Mr. Sevince's application for review and his appeal against the implied decision rejecting the request, brought before the *Raad van State*, automatically suspended the effect of the refusal to extend his residence permit. On 12 June 1986, the *Raad van State* dismissed the appeal. Meanwhile, Mr. Sevince had obtained an employment certificate, which was valid until the judgment of the *Raad van State* delivered on 12 June 1986. On 13 April 1987, Mr. Sevince again applied for a residence permit, arguing that he had been employed for a number of years now in The Netherlands. He thereby relied on provisions of Decisions Nos. 2/76 and 1/80 of the EC-Turkey Association Council. According to these provisions, a Turkish worker, registered as belonging to the labour force of a Member State of the Community, is to enjoy free access to any employment of his choice, after a certain period of legal employment. When Sevince's appeal against the decision of the *Staatssecretaris van Justitie*, rejecting his application of 13 April 1987, was brought before the *Raad van State*, the latter decided to refer questions to the Court of Justice, considering the fact that the dispute involved interpretation of the provisions of Decisions Nos. 2/76 and 1/80 of the EC-Turkey Association Council.

The first question referred to the Court of Justice was whether the interpretation of the decisions of the Council of Association fell within the jurisdiction of the Court under Article 177 of the EC Treaty. After having stated that "as the Court has consistently held, the provisions of an agreement concluded by the Council under Articles 228 and 238 of the EEC Treaty form an integral part of the Community legal system as from the entry into force of that agreement",<sup>37</sup> the Court referred to its judgment delivered in *Case 30/88 Greece v. Commission*.<sup>38</sup> In this judgment, the Court already had stated briefly that because of their close link to the agreement to which they gave effect, decisions of the EC-Turkey Association Council also form an integral part of the Community legal system, as from their entry into force. Therefore, the Court argued, it had also jurisdiction to give interpretations of those decisions.<sup>39</sup> The Court further mentioned its judgment in *Kupferberg* and held that its finding

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<sup>37</sup> [1990] E.C.R. I-3461, at I-3500 (paragraph 8).

<sup>38</sup> *Case 30/88 Hellenic Republic v. Commission*, [1989] E.C.R. 3711.

<sup>39</sup> [1990] E.C.R. I-3461, at I-3500 (paragraphs 9 and 10).

was "reinforced by the fact that the function of Article 177 of the EEC Treaty is to ensure the uniform application throughout the Community of all provisions forming part of the Community legal system and to ensure that the interpretation thereof does not vary according to the interpretation accorded to them by the various Member States".<sup>40</sup>

It appears that, just as in respect of Community law proper, the Court of Justice is mainly concerned with the uniform application of the law deriving from international agreements concluded by the Community throughout the whole Community. The common policy of the Community, as reflected in its international agreements, requires that these agreements have the same penetrating force in all Member States. An international agreement concluded by the Community constitutes an obligation for the Community as well as for the Member States. For the Community this is an obligation under international law. For the Member States, not party to it, it is an obligation under Community law, an obligation towards the responsible Community. Therefore, the scope of this Community obligation is evidently a question of Community law which is to be answered, in last resort, by the Court of Justice in accordance with Community law, and not by national courts according to their own domestic law.<sup>41</sup>

There are several arguments favouring the direct application of international agreements in a domestic legal system. First, direct application provides for a better guarantee that all parties will fulfil their obligations under the agreement.<sup>42</sup> That is why Pescatore has proposed a good faith obligation under customary international law to give treaties direct application. In his view, the incorporation procedures based on transformation are by their very essence incompatible with good faith in international relations. When a State ratifies a treaty it promises the unqualified implementation of a treaty. The transformation method leaves the State the possibility of "not implementing a treaty at all, or of implementing only part of it, or of altering its effect unilaterally, or of unilaterally putting an end to its operation on the state's territory".<sup>43</sup> Second, the effectiveness of international law increases when the

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<sup>40</sup> [1990] E.C.R. I-3461, at I-3501 (paragraph 11).

<sup>41</sup> See Bebr, *supra* note 25, at 43.

<sup>42</sup> See J.H. Jackson, 'Status of Treaties in Domestic Legal Systems: A Policy Analysis', 86 A.J.I.L. 310 (1992), p. 322.

<sup>43</sup> See P. Pescatore, Conclusion, to: F.G. Jacobs and S. Roberts (eds.), *The Effect of Treaties in Domestic Law* 273 (1987), p. 282. See also Jackson, *supra* note 42, at 322.

norms are directly applied without leaving room for national authorities to refuse transformation of the treaty norms into domestic law.<sup>44</sup> Third, direct application better guarantees, in principle, the rights of individuals when a treaty includes norms designed to apply to those individuals. Individuals can invoke treaty norms directly without the need for an act of transformation. An act of transformation may give too much temptation to governments to change the precise wording of the treaty, perhaps into less precise language, and therefore to transform a norm that does not accord with the treaty norm itself.<sup>45</sup> Fourth, when governments want a federal system, or 'pre-federal' system, to be more responsive to the federal level of authority, binding international law should be directly applicable.<sup>46</sup>

Various arguments are made against the direct applicability of treaties. First, it is argued that when a State commits itself to an international obligation, it is entitled to determine for itself how to fulfil that obligation, as long as it does so in good faith. To demand the direct application of treaties could be viewed as tantamount to interference in the internal affairs of a sovereign State.<sup>47</sup> Second, the act of transformation serves as an important democratic check on the treaty-making process. Some constitutions provide for very little democratic participation in the field of treaty-making. In such cases, it is said, there should be a requirement to obtain parliamentary approval.<sup>48</sup> Third, legislatures may wish to change the treaty somewhat to fit domestic circumstances.<sup>49</sup> Fourth, direct application could result in court determinations that the government is acting in violation of the treaty which could, of course, seriously embarrass that government. Moreover, since some States do not allow direct application, the asymmetry involved could be considered unfair.<sup>50</sup> Fifth, if a treaty is directly applicable, it could be argued that an international body's interpretation of a treaty norm is definitive in domestic law as well. In this view, since the domestic law consists of the international treaty applied directly, the international interpretations are binding on the

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<sup>44</sup> See Jackson, *supra* note 42, at 322.

<sup>45</sup> *Ibid.*

<sup>46</sup> See Jackson, *supra* note 42, at 323.

<sup>47</sup> *Ibid.*

<sup>48</sup> See Jackson, *supra* note 42, at 323/324.

<sup>49</sup> Although it could be argued that as such the legislature desires to preserve the option to breach the treaty. See Jackson, *supra* note 42, at 325.

<sup>50</sup> See Jackson, *supra* note 42, at 326.



domestic legal institutions, including the courts. An act of transformation, however, is an act of the domestic legal system, and thus can be interpreted by the courts like other domestic legal acts. Nonetheless, even in the case of a directly applicable treaty norm, domestic courts may feel that they have the power of interpretation.<sup>51</sup>

#### *D. The Direct Application of GATT*

##### *1. International Fruit Company and its Progeny*

GATT 1947 is not an agreement binding on the Community by virtue of Article 228 of the EC Treaty. However, at the time when the 'original six' concluded the Treaty of Rome, they were all contracting parties to GATT 1947.<sup>52</sup> Therefore, the GATT had to be respected by the Community under Article 234 of the EC Treaty. The Court of Justice, however, preferred the Community itself to be bound by GATT. The *Third International Fruit Company* judgment of 12 December 1972<sup>53</sup> explains why the provisions of GATT 1947 were applicable in the Community and could consequently have been interpreted by the Court of Justice under Article 177 of the EC Treaty.

In the spring of 1970, an increase in the domestic apple production of several Member States led the Commission to take protective measures in order to limit imports to a level which the Community could reasonably absorb. With effect from 1 April, and until 30 June 1970, all imports into the Community of apples other than cider apples were subject to the presentation of an import license. In May, four Dutch fruit-importing firms - among them International Fruit Company - requested the appropriate Dutch authority, the Produktschap

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<sup>51</sup> See Jackson, *supra* note 42, at 326/327.

<sup>52</sup> Belgium, The Netherlands, Luxembourg and France were among the founding fathers of GATT and have thus applied the General Agreement since January 1, 1948. Italy applies the GATT since the entry into force of the Annecy Protocol of Terms of Accession to GATT in 1950, and Germany on the basis of the Torquay Protocol which entered into force in 1951. See E.-U. Petersmann, 'The EEC as a GATT Member - Legal Conflicts Between GATT law and European Community Law', in: M. Hilf, F.G. Jacobs and E.-U. Petersmann, *The European Community and GATT* 23 (1986), p. 32.

<sup>53</sup> Joined Cases 21-24/72 *International Fruit Company and Others v. Produktschap voor Groenten en Fruit*, [1972] E.C.R. 1219.

voor Groenten en Fruit (PGF), to issue them with the necessary certificates. Upon rejection, the importers first brought a direct action under Article 173 of the EC Treaty before the Court of Justice. In its judgment of 13 May 1971, the Court declared the action admissible but unfounded.<sup>54</sup> Secondly, the companies appealed to the College van Beroep voor het Bedrijfsleven (CBB), the competent national Appeal Court, for the annulment of the decision of rejection notified to them by the PGF. Before the CBB, the companies argued in particular that the Netherlands State had, contrary to the relevant Community regulation, transferred power and obligations deriving from that regulation to the PGF, and that certain applicable provisions of Dutch law were contrary to Community rules. The CBB then referred the matter to the Court of Justice under Article 177, which gave a preliminary ruling in its judgment of 15 December 1971.<sup>55</sup> In the same main action before the CBB, the importers further submitted that the regulations in question constituted a violation of Article XI of GATT, which prohibits the institution or maintenance of quantitative restrictions, except under certain circumstances and upon observance of certain formalities. Again the CBB sought recourse to Article 177 EC in order to submit certain questions to the Court. The first question was whether the validity of measures adopted by the institutions of the Community also referred, within the meaning of Article 177, to their validity under international law. The Court held that under the formulation of Article 177, its jurisdiction could not be limited by the grounds on which the validity of those measures may be contested and, because its jurisdiction extends to all grounds capable of invalidating those measures, the Court "is obliged to examine whether their validity may be affected by reason of the fact that they are contrary to a rule of international law".<sup>56</sup>

In *Third International Fruit Company*, the Court of Justice did not wish to base its judgment on the ground that the Member States of the Community are bound by GATT under Article 234 EC, but took the position that the Community as such became a party to GATT by way of succession (or substitution). According to the Court, it is clear that the incompatibility of a Community measure with a provision of international law can only affect the validity of

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<sup>54</sup> Joined Cases 41-44/70 *International Fruit Company and Others v. Commission*, [1971] E.C.R. 411.

<sup>55</sup> Joined Cases 51-54/71 *International Fruit Company and Others v. Produktschap voor Groenten en Fruit*, [1971] E.C.R. 1107.

<sup>56</sup> [1972] E.C.R. 1219, at 1226 (paragraph 6).

such a measure if, first of all, the Community is bound by that provision.<sup>57</sup> The Court found that GATT became legally binding on the Community, although it never formally acceded to GATT. Three steps in the Court's reasoning can be identified. First, the Court observed that the Member States were bound by GATT and could not simply, by concluding a treaty between themselves, withdraw from it. Indeed, it was clear that they wished to observe the GATT commitments entered into and did not want to withdraw. This followed from the provisions of the EEC Treaty, and also from the declarations made by Member States on the presentation of this Treaty to the contracting parties of GATT in accordance with the obligation under Article XXIV of GATT.<sup>58</sup> Second, the Court explained how the Member States had sought to bind the Community as such to GATT, and that this had been accepted by the other contracting parties. Under Articles 111 and 113 of the EEC Treaty, the Community assumed the functions inherent in the tariff and trade policy, progressively during the transitional period, and in their entirety on the expiry of that period. By conferring these powers on the Community, the Member States expressed their wish to bind it by the obligations entered into under GATT. Since the entry into force of the EEC Treaty and, in particular, since the establishment of the common external tariff, the transfer of powers in the relations between the Member States and the Community has been made concrete within the GATT framework and has been recognized by the other contracting parties.<sup>59</sup> Third, the Court examined how in the following years the Community behaved as a GATT contracting party. Acting through its own institutions, the Community appeared as a partner in the tariff negotiations and as a party to the agreements of all types concluded within the framework of GATT. It concluded by stating that it "therefore appears that, in so far as under the EEC Treaty the Community has assumed the powers previously exercised by Member States in the area governed by the General Agreement, the provisions of that agreement have the effect of binding the Community".<sup>60</sup>

As noted above, the Court held that its jurisdiction could not be limited by the grounds on which the validity of Community measures may be contested and, because its jurisdiction extends to all grounds capable of invalidating those measures, the Court "is obliged to

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<sup>57</sup> [1972] E.C.R. 1219, at 1226 (paragraph 7).

<sup>58</sup> [1972] E.C.R. 1219, at 1226 (paragraphs 10-12.)

<sup>59</sup> [1972] E.C.R. 1219, at 1227 (paragraphs 14-16).

<sup>60</sup> [1972] E.C.R. 1219, at 1227 (paragraphs 17-18).

examine whether their validity may be affected by reason of the fact that they are contrary to a rule of international law".<sup>61</sup> Kapteyn has argued that in the Court's reasoning there is a gap between the premise (that is, no restriction of the jurisdiction of the Court), and the conclusion (that is, obligation to examine). He has argued that the conclusion presupposes another premise: rules of international law as such form part of the Community legal system and consequently must be applied by the Court, in the sense that the application of these rules form part of the mandate of the Court. What are the arguments from which it may appear that the application of international law as such forms part of the Court's mandate?<sup>62</sup> Schermers also noted the deficiency in the Court's reasoning and pointed out that rules of international law can only be applied in so far as they form part of the Community legal order. In his view, Article 164 of the EC Treaty should be read as meaning that the Court of Justice shall ensure the observance of Community law or the law as accepted within the Community.<sup>63</sup> As noted above, the Court later clarified its incomplete reasoning in its *Haegeman* ruling and made clear that international agreements form an integral part of Community law; international agreements are directly applicable in the legal order of the Community.

The Court reconfirmed its view that GATT 1947 was legally binding on the Community itself in the *Nederlandse Spoorwegen* judgment.<sup>64</sup> In this case, the customs agent of the Netherlands Railways had presented a photocopier for clearance, upon which a duty of 14% had been levied by the Dutch customs authorities. According to the customs agent, the copier should have been classified under a different heading and a duty of 7.2% should have been applied. He argued, *inter alia*, that the relevant customs duties were bound under GATT agreements at the rate of 7.2%. Accordingly, pursuant to Article II of GATT, customs duties should not be levied at rates in excess of those bound under GATT. The Inspector of Customs and Excise rejected the customs agent's complaint which resulted in an appeal by the agent to the *Tariefcommissie*. The *Tariefcommissie* stayed the proceedings and referred questions to the

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<sup>61</sup> [1972] E.C.R. 1219, at 1226 (paragraph 6).

<sup>62</sup> See P.J.G. Kapteyn, 'The 'Domestic' Law Effect of Rules of International Law within the European Community System of Law and the Question of the Self-Executing Character of GATT Rules', *Int'l Law*. 74 (1974), p. 74/75.

<sup>63</sup> See H.G. Schermers, 'Community Law and International Law', 12 *C.M.L.Rev.* 77 (1975), p. 78.

<sup>64</sup> Case 38/75 *Douaneagent der N.V. Nederlandse Spoorwegen v. Inspecteur der invoerrechten en accijnzen*, [1975] E.C.R. 1439.

Court for a preliminary ruling. One of the questions was whether a Dutch court was required to apply certain GATT provisions, even though it might thereby come into conflict with Community law. The Court affirmed its opinion as regards the substitution of the Community for the Member States, clarified its consequences, and extended its reasoning to the Brussels Convention of 1950 on Nomenclature for the Classification of Goods in Customs Tariffs, by stating that:

since so far as fulfilment of the commitments provided for by GATT is concerned, the Community has replaced the Member States, the mandatory effect, in law, of these commitments must be determined by reference to the relevant provisions in the Community legal system and not to those which gave them their previous force under the national legal systems.<sup>65</sup>

Just as, in the case of commitments arising from GATT, the Community has replaced the Member States in commitments arising from the Convention ..., and is bound by the said commitments.<sup>66</sup>

The view of the Court that GATT 1947 was a legally binding agreement for the Community itself was again reaffirmed in three judgments delivered on 16 March 1983: *SIOT*,<sup>67</sup> *SPI/SAMI*<sup>68</sup> and *Singer and Geigy*.<sup>69</sup> The facts of *SIOT* and *SPI/SAMI* may be summarized as follows.

The Società Italiana per l'Oleodotto Transalpino (*SIOT*) is in charge of the Italian section of an oil pipe-line between Trieste and the Austrian border. Crude oil, unloaded in the port of Trieste, is pumped through the pipe-line in part to Germany and in part to Austria. Under an Italian law of 1963, a 'State unloading charge' was payable in all Italian ports on goods which came from abroad and were intended for import and, in specified ports including Trieste, also a 'port charge' on goods loaded and unloaded, regardless of their origin or their destination. The first charge was not applicable to oil discharged by *SIOT*, because this oil

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<sup>65</sup> [1975] E.C.R. 1439, at 1450 (paragraph 16).

<sup>66</sup> [1975] E.C.R. 1439, at 1450 (paragraph 21).

<sup>67</sup> Case 266/81 *Società Italiana per l'Oleodotto Transalpino (SIOT) v. Ministero delle Finanze, Ministero della Marina Mercantile, Circonscrizione doganale di Trieste and Ente Autonomo del Porto di Trieste*, [1983] E.C.R. 731.

<sup>68</sup> Joined Cases 267-269/81 *Amministrazione delle Finanze dello Stato v. Società Petrolifera Italiana SpA (SPI) and SpA Michelin Italiana (SAMI)*, [1983] E.C.R. 801.

<sup>69</sup> Joined Cases 290 and 291/81 *Compagnia Singer SpA and Geigy SpA v. Amministrazione delle Finanze dello Stato*, [1983] E.C.R. 847. As in the *SPI/SAMI* Case, the two companies Singer and Geigy also challenged the charges for administrative services. According to the ECJ, the questions referred to it by the national court were in substance identical to the questions submitted in *SPI/SAMI* and it therefore largely repeated its rulings. For that reason, no direct reference will be made to this case in the following discussion.

was not intended for importation. The second charge was not applicable because the law contained an exemption expressly in favour of goods in transit in the port of Trieste. In its *Variola* judgment of 10 October 1973,<sup>70</sup> the Court had ruled that a charge imposed exclusively on imported goods, solely because they were unloaded in national ports, constituted a charge having an effect equivalent to a customs duty and was therefore incompatible with Community law. Italy amended its legislation in 1974. The unloading charge was replaced by a 'revenue charge', applicable regardless of the origin or destination of the goods. The port charge remained in force in accordance with the provisions of the law of 1963, but the exemption previously provided in favour of transit through the port of Trieste was abolished. Accordingly, SIOT was required by the Trieste customs authority to pay both the charges. The company challenged the imposition of these duties on the ground that this was in various respects incompatible with Community law and with GATT law, particularly Article V on the freedom of transit. The dispute was brought before courts in first instance and, upon dismissal, appeals were lodged before the Corte d'Appello of Trieste, which also dismissed the appeals in successive judgments. Later, several appeals in cassation were brought before the Corte Suprema di Cassazione, which considered it necessary to obtain a ruling on, inter alia, the interpretation of Article V(3) GATT.

In the *SPI/SAMI* Case, two Italian importers, the Società Petrolifera Italiana (SPI) and Michelin Italiana (SAMI), contested the levying of a duty for administrative services by the Amministrazione Finanze dello Stato on various goods imported by them from third States, which were also parties to GATT. The two companies brought actions before the appropriate Italian courts for the refund of these payments, claiming that the duty for administrative services - introduced by Law No. 330 of 1950 - was higher than the duties bound in the framework of GATT, first by Italy and later by the Community in the Dillon Round. In their view, the introduction of new charges such as the contested duty was contrary to the combined provisions of the GATT Preamble and, in particular, Article II of GATT. They succeeded partly in first instance and on appeal. Therefore, the Administration lodged an appeal in cassation against these judgments before the Corte Suprema di Cassazione. The Corte Suprema di Cassazione decided to refer certain questions to the Court of Justice for a preliminary ruling.

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<sup>70</sup> Case 34/73 *F.lli Variola SpA v. Amministrazione Italiana delle Finanze*, [1973] E.C.R. 981.

In *SIOT* and *SPI/SAMI*,<sup>71</sup> Advocate-General Reischl first of all stressed that it was already clear from the case-law of the Court of Justice that the scope of Article 177 also encompassed agreements concluded by the Community. According to Article 228, such agreements give rise to obligations under Community law and they must be considered an integral part of Community law. Another important point, the Advocate-General argued, was that it had already been established in the case-law relating to GATT that the Community is bound by GATT because it has assumed the powers previously exercised by the Member States within the sphere of application of GATT and that the Community has, as regards the fulfilment of commitments arising from GATT, replaced the Member States. Therefore, he stated, "it is reasonable to regard GATT as binding the Community just as if it were an agreement concluded by the Community, and consequently to regard the provisions of GATT - in any event insofar as the Community has been substituted for the Member States - as part of the Community legal order".<sup>72</sup> The Court did not explicitly state that GATT should be considered an integral part of Community law. Nevertheless, this must be concluded from its observations. In *SPI/SAMI*, the Court clarified that it is of vital importance that the GATT provisions, like the provisions of all other agreements binding the Community, are uniformly applied throughout the Community:

any difference in the interpretation and application of provisions binding the Community as regards non-member countries would not only jeopardize the unity of the commercial policy, which according to Article 113 of the Treaty must be based on uniform principles, but also create distortions in trade within the Community, as a result of differences in the manner in which the agreements in force between the Community and non-member countries were applied in the various Member States.<sup>73</sup>

Hartley has observed that the Court did not really try to pretend that GATT (1947) was an act of an institution of the Community.<sup>74</sup> It did not even try to decide the issue on legal grounds. By stating immediately that the provisions of the GATT, as of all international agreements binding the Community, must be given uniform interpretation throughout the Community, since any difference in interpretation and application would compromise the unity of the common commercial policy and create distortions in trade within the Community, it turned instead directly to policy arguments. No reference was made to the actual wording of Article 177, since this would not have led to the desired result. The Court

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<sup>71</sup> The Advocate-General mainly delivered his Opinion in *SIOT* and referred to it in *SPI/SAMI*.

<sup>72</sup> [1983] E.C.R. 731, at 789.

<sup>73</sup> [1983] E.C.R. 801, at 828 (paragraph 14).

<sup>74</sup> See Hartley, *supra* note 20, at 391/392.

characterized Article 177 on a purely functional basis by stating that its purpose is to ensure the uniform application of Community law and that the GATT therefore also should be covered by it.<sup>75</sup> In Hartley's view, the Court should not have substituted policy for law. Although it is desirable that international agreements binding the Community are given uniform interpretation in all Member States, he argues, the law should have prevailed in a matter as important as the jurisdiction of the Court, especially where the written text is clear. Policy is not law, the author notes, and it is fundamental to all Western legal thought that what the law is, and what it ought to be, are not necessarily the same.<sup>76</sup>

One of the questions referred to the Court by the Corte Suprema di Cassazione was from which date and within which limits the substitution of the Community for the Member States had taken place, considering the fact that the Community had already negotiated tariff concessions and made bindings within the framework of GATT before 1 July 1968, the date of the introduction of the Common Customs Tariff. The Court referred to its statement made in the *Third International Fruit Company* judgment and stated more precisely that:

since as regards the fulfilment of the commitments laid down in GATT the Community has been substituted for the Member States with effect from 1 July 1968, the date on which the Common Customs Tariff was brought into force, the provisions of GATT have since that date been amongst those which the Court has jurisdiction, by virtue of Article 177 of the EEC Treaty, to interpret by way of preliminary ruling, regardless of the purpose of such interpretation. With regard to the period prior to that date such interpretation is a matter exclusively for the courts of the Member States.<sup>77</sup>

## 2. GATT as an Integral Part of Community law

As noted above, the Court of Justice stated in the *Third International Fruit Company* Case that its jurisdiction cannot not be limited by the grounds on which the validity of those measures may be contested. Since its jurisdiction extends to all grounds capable of invalidating those measures, the Court was obliged to examine whether their validity may be affected by reason of the fact that they are contrary to a rule of international law. It follows from this ruling, in

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<sup>75</sup> The risk of non-uniform application of Community law, including binding international law, has been reduced considerably with the *Foto-Frost* judgment in which the Court ruled that national judges no longer may decline application of Community law without reference to the Court for a preliminary ruling. Case 314/85 *Foto-Frost v. Hauptzollamt Lübeck-Ost*, [1987] E.C.R. 4199. See Bourgeois, *supra* note 22, at 14.

<sup>76</sup> See Hartley, *supra* note 20, at 392.

<sup>77</sup> [1983] E.C.R. 801, at 829 (paragraph 19).



connection with the above-mentioned judgments *Haegeman*, *Kupferberg*, *SPI/SAMI* and *SIOT*, that the Court's interpretation of Article 164 of the EC Treaty - which provides that it is the task of the Court of Justice to ensure that in the interpretation and application of the Treaty the law is observed - is broad. This law to be observed thus includes norms of international law deriving from international agreements which bind the Community and are therefore a part of the Community legal system.<sup>78</sup> The provisions of GATT 1947 formed an integral part of Community law, as norms of international agreements concluded by the Community, alone or together with the Member States.<sup>79</sup> The common commercial policy indeed requires that the GATT has the same potential impact in all the Member States. If the Court of Justice had not recognized this fact, the different methods of incorporation in the Member States could have led to serious deviations.

The direct application of GATT 1994 is different from the direct application of GATT 1947. The WTO Agreement has been accepted by the Council under Article 228(7) of the EC Treaty and is therefore binding on the Community and the Member States and on that basis an integral part of the Community legal system without the need for transformation. The Community is entirely responsible for the proper performance by the Community and the Member States of the Agreements on Trade in Goods: GATT 1994 and the new side-agreements. Most of the side-agreements will be (more or less literally) transcribed into Community law, but GATT 1994, with its broad obligations of non-discrimination, will not be 'reproduced'. However, under Article XVI:4 of the WTO Agreement "each Member shall ensure the conformity of its laws, regulations and administrative procedures with its obligations as provided in the annexed Agreements". The laws, regulations and administrative procedures of the Community and its Member States will have to be brought into conformity with all the Agreements on Trade in Goods, including GATT 1994. This is a responsibility of the Community. By virtue of the fact that these agreements are binding on the Community and its Member States under Article 228(7) EC, the provisions of these agreements form an integral part of the Community legal system. They are therefore part of the legal rules under which the Court of Justice exercises its control over the actions of Member States and Community institutions. Obligations arising from international

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<sup>78</sup> See Pescatore, *supra* note 23, at 182.

<sup>79</sup> Cf. Petersmann, *supra* note 19, at 418 and 436. Cf. Pescatore, *supra* note 23, at 182. Cf. Schermers and Waelbroeck, *supra* note 1, at 106. *Implicitly* Bebr, *supra* note 25, at 43. See, however, E.L.M. Völcker, 'The Direct Effect of International Agreements in the Community's Legal Order', 1 L.I.E.I. 131 (1983), p. 142/143.

agreements binding the Community are "obligations under the Treaty" in the sense of, for example, Article 169 EC. Non-compliance with these obligations justifies an action by the Commission against a Member State for violations of Community obligations. In *SIOT*, the Court explicitly held that the Community is under the "obligation to ensure that the provisions of GATT are observed in its relations with non-member States which are parties to GATT".<sup>80</sup> This observation is also valid for GATT 1994 and the new side-agreements.

It thus appears that there are three kinds of international agreements with third States that form part of the Community legal system. Firstly, agreements between the Community and one or more third States concluded where the subject-matter falls within the treaty-making power of the Community. For example, GATT 1994 and the Uruguay Round side-agreements. Secondly, mixed agreements between, on the one hand, both the Community and the Member States, and, on the other hand, the third State(s), concluded where the subject-matter falls partly within the power of the Community and partly within that of the Member States. For example, GATS and TRIPs.<sup>81</sup> Thirdly, agreements between the Member States alone and third States to which the Community becomes a party by succession or substitution, concerning agreements where the subject-matter fell within the power of the Member States at the time when they were concluded, but has been subsequently assumed by the Community. Only three agreements have been recognized by the Court to fall within this last category: the 1950 Convention on Nomenclature for the Classification of Goods in Customs Tariffs, the 1950 Convention establishing a Customs Co-operation Council, and GATT 1947.

### *E. Conclusion*

In *Costa v. ENEL*, the Court of Justice made clear that the Treaty created "its own legal system which on the entry into force of the Treaty, became an *integral part* of the legal systems of the Member States and which their courts are bound to apply".<sup>82</sup> The Court thus opted for a monist view of the relationship between Community law and Member State domestic law.

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<sup>80</sup> [1983] E.C.R. 731, at 780 (paragraph 28).

<sup>81</sup> An interesting question, which falls outside the scope of this study, pertains to whether the Court of Justice will claim jurisdiction for the interpretation of GATS and TRIPs. From its *Demirel* judgment, it would seem that the Court will claim such jurisdiction.

<sup>82</sup> [1964] E.C.R. 585, at 593 (emphasis added).

In the Court's opinion, Community law must apply directly in the territory of the Member States. Membership of the Community entails immediate obedience to Community law. In *Haegeman*, the Court declared that international agreements concluded by the Community also "from the coming into force thereof, form an integral part of Community law".<sup>83</sup> It follows that the Court also views the relationship between international law and Community law as monist. In theory, perhaps, the Court did have a choice between a dualist or monist stance in respect of the relationship between international law and Community law. In reality, however, it would have been illogical to make an ideological distinction between, on the one hand, international law penetrating the Community legal order and, on the other hand, Community law penetrating the legal orders of the Member States, as Advocate General Mayras rightly noted in *International Fruit Company*.<sup>84</sup> Moreover, in practice application of an international agreement may, at times, fall within the competence of the Member States. In that case, the judges of the Member States would have to assess the impact of the treaty provision at issue in their territory on the basis of their own mandates. As noted previously, these mandates greatly differ from State to State. Hence, the impact of the treaty would greatly differ. Obviously, the existence of such a situation would imperil the unity of the Community. It follows from the *International Fruit Company* judgment and from *SIOT* and *SPI/SAMI* that the Court also considers GATT an integral part of Community law. In *International Fruit* the Court held that it was "obliged to examine" whether GATT law could affect the validity of Community law, thus implying that GATT law formed part of the Community legal order.<sup>85</sup> In *SPI/SAMI* it considered that a difference in application of GATT provisions in the Member States "would not only jeopardize the unity of the commercial policy, which according to Article 113 of the Treaty must be based on uniform principles, but also create distortions in trade within the Community".<sup>86</sup> Acceptance of the full incorporation of GATT 1947 into the Community legal system without the need for transformation has not caused the Court of Justice much difficulty. The Court in fact has had no choice. Acceptance of the fact that GATT 1947 was binding on the Community as such - given GATT's subject-matter a logical conclusion - implied integration of the GATT provisions into the Community legal order. Although the direct application of GATT 1994,

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<sup>83</sup> [1974] E.C.R. 449, at 460 (paragraph 5).

<sup>84</sup> [1972] E.C.R. 1219, at 1235.

<sup>85</sup> [1972] E.C.R. 1219, at 1226 (paragraph 6).

<sup>86</sup> [1983] E.C.R. 801, at 828 (paragraph 14).

the international agreement this study is mainly concerned with, is technically different from the direct application of GATT 1947, there is no real difference in practice. The GATT provisions were already an integral part of Community law.

From the language used in the above-mentioned cases it appears that the Court of Justice has opted for the monist approach for two reasons. First, as already noted, the Court wishes to protect the unity of the European Community. The Court wants the Member States to be responsive to the 'federal' level and it therefore cannot allow a possible difference in application of international law, especially not a difference in application of such an important treaty like the GATT. Second, the Court appears genuinely concerned with the due performance by the Member States of international obligations arising from binding international agreements of the Community. As the Court held in *Kupferberg*, the Community has assumed responsibility for the due performance of international agreements and "in ensuring respect for commitments arising from an agreement concluded by the Community institutions the Member States fulfil an obligation (...) above all in relation to the Community".<sup>87</sup> As performance of international obligations may fall within the competence of the Member States, the Community, responsible for due performance to third States, must be able to rely on the Member States. Evidently, compliance with international obligations also would be greatly enhanced if private parties would be allowed to invoke the treaty norms in question in court. One of the great advantages of the monist approach is that international law may be regarded as a self-imposed restraint on governments agreed upon to ensure a better functioning of the domestic legal system. Since direct effect of Community law proper is the rule rather than the exception, it is tempting to draw conclusions as to a direct effect of an international agreement from the opinion of the Court that such an agreement, upon its due conclusion, approval and publication, forms an integral part of Community law. Does the fact that an agreement is part of Community law imply that its provisions are in principle capable of conferring rights on individuals? As we have seen, there is no doubt that such an agreement imposes obligations on the Community and the Member States, but does this mean that, in principle, it cannot be denied direct effect? The following chapter will attempt to provide an answer to this question.

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<sup>87</sup> [1982] E.C.R. 3641, at 3662 (paragraph 13).



## IV

### *The Direct Effect of GATT*

#### *A. Introduction*

FROM the case-law of the Court of Justice it appears that, as a rule, the Court has interpreted provisions of international agreements without questioning their direct effect.<sup>1</sup> When it has addressed the issue, it normally has dealt with it on the level of the particular provision in question. However, in the case of GATT the Court has unequivocally denied direct effect of the whole agreement as such.<sup>2</sup> The present chapter will examine this case-law of the Court of Justice. Before dealing with GATT, however, the observations which essentially motivated the Court to recognize the direct effect in principle of the EC Treaty shall be briefly reviewed. Moreover, the case-law of the Court on the effect of other international agreements in the Community legal order may shed some light on the problem at issue. Section B will show that in assessing the EC Treaty the Court found its nature appropriate and its structure adapted to produce direct effect. These issues reappear in the assessment of the suitability of international agreements to produce direct effect. Section C therefore will examine the Court's relevant case-law in the light of these two main features of international agreements which determine their suitability to produce direct effect.

As to the nature of a treaty, two 'reciprocity' issues will be examined. First, reciprocity as the initial balance of obligations constituting the very foundation of the relationship between the contracting parties to the agreement. Second, 'procedural reciprocity' in the sense that there perhaps should be a reciprocity in enforcement of the obligations of the parties in order to

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<sup>1</sup> See, e.g., Case 40/72 *I. Schroeder v. Federal Republic of Germany*, [1973] E.C.R. 125; Case 181/73 *R. & V. Haegeman v. Belgian State*, [1974] E.C.R. 449; Case 65/77 *Jean Razanatsimba*, [1977] E.C.R. 2229; Case 52/77 *Leonce Cayrol v. Giovanni Rivoira & Figli*, [1977] E.C.R. 2261; Case 156/85 *Procureur de la Republique v. Perles Eurotool and Others*, [1986] E.C.R. 1595.

<sup>2</sup> In two cases, however, the Court of Justice also has avoided the issue. In both *Nederlandse Spoorwegen* and *Dürbeck*, Advocate-General Reischl had considered direct effect a precondition for review, but the Court did not find it necessary to rule on this matter. See Case 38/75 *Douaneagent der N.V. Nederlandse Spoorwegen v. Inspecteur der invoerrechten en accijnzen*, [1975] E.C.R. 1439. Case 112/80 *Firma Anton Dürbeck v. Hauptzollamt Frankfurt am Main-Flughafen*, [1981] E.C.R. 1095.

maintain the initial balance. If obligations of the Community could be more effectively enforced than those of the other contracting parties, this might destroy the initial balance and therefore adversely affect the nature of the agreement. Two structural, institutional elements are also important when assessing an international agreement regarding its ability to produce direct effect. First, the possibility of derogating from the obligations under the agreement, for example by invoking a safeguard clause. Second, the existence and functioning of a procedure to settle disputes between the contracting parties, whereby it may be relevant whether the agreement contains a specific instrument (similar to the instruments of the EC Treaty) to ensure uniform application of the law deriving from the agreement. Just as in the case where there is a lack of reciprocity in enforcement because one party gives direct effect to the agreement while the other does not, conflicting decisions given by national courts could also give rise to an imbalance in the implementation of a treaty.

### *B. The Direct Effect of Community Law*

As regards the issue of the direct effect of Community law, two judgments in particular are important, again those delivered in *Van Gend & Loos*<sup>3</sup> and *Costa v. ENEL*.<sup>4</sup> In *Van Gend & Loos*, the Court of Justice first recognized the direct effect in principle of the EC Treaty. The case dealt with the standstill provision of Article 12 EC. This provision provides that: "Member States shall refrain from introducing between themselves any new customs duties or imports or exports or any charges having equivalent effect and from increasing those which they already apply in their trade with each other". Since the Member States were explicitly named as the addressees, it was perhaps not surprising that the intervening governments, as well as Advocate-General Roemer, argued that Article 12 could not give rights to individuals. The Court, however, disagreed. After explaining that to determine whether the provisions of a treaty can have direct effect "it is necessary to consider the spirit, the general scheme and the wording of those provisions",<sup>5</sup> it stated that:

the objective of the EEC Treaty, which is to establish a Common Market, the functioning of which is of direct concern to interested parties in the Community, implies that this Treaty is more than an agreement which merely creates mutual obligations between the contracting states. This view

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<sup>3</sup> Case 26/62 *Algemene Transport- en Expeditie Onderneming van Gend & Loos v. Nederlandse administratie der belastingen*, [1963] E.C.R. 1.

<sup>4</sup> Case 6/64 *Costa v. ENEL*, [1964] E.C.R. 585.

<sup>5</sup> [1963] E.C.R. 1, at 12.

is confirmed more specifically by the establishment of institutions endowed with sovereign rights, the exercise of which affects Member States and also their citizens.<sup>6</sup>

In addition the task assigned to the Court of Justice under Article 177, the object of which is to secure uniform interpretation of the Treaty by national courts and tribunals, confirms that the states have acknowledged that Community law has an authority which can be invoked by their nationals before those courts and tribunals.<sup>7</sup>

The conclusion to be drawn from this is that the Community constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only Member States but also their nationals. Independently of the legislation of Member States, Community law therefore not only imposes obligations on individuals but is also intended to confer upon them rights which become part of their legal heritage.<sup>8</sup>

Subsequently, the Court held that Article 12 had direct effect since it is clear and unconditional and therefore "ideally adapted to produce direct effects in the legal relationship between Member States and their subjects".<sup>9</sup> The arguments put forward by the Dutch Government in particular, that alleged violations of the Treaty only could be tested under Articles 169 and 170 of the Treaty, were not considered to be valid. In the view of the Court, "the vigilance of individuals concerned to protect their rights amounts to an effective supervision in addition to the supervision entrusted by Articles 169 and 170 to the diligence of the Commission and of the Member States".<sup>10</sup>

In *Costa v. ENEL*, the Italian Government claimed that the submission to the Court of Justice by the Italian judge was inadmissible. Whether the national law in question was compatible with the EC Treaty could not be litigated under Article 177, the Italian Government argued, but only under Articles 169 and 170, and even these procedures could not immediately affect the validity of a statute. Until repealed, following a judgment of the Court declaring its incompatibility with the Treaty, an Italian judge therefore should apply national law, even if it conflicted with the Treaty.<sup>11</sup> The Court of Justice, however, held that:

By contrast with ordinary international treaties, the EEC Treaty has created its own legal system which, on the entry into force of the Treaty, became an integral part of the legal systems of the

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<sup>6</sup> *Ibid.*

<sup>7</sup> *Ibid.*

<sup>8</sup> *Ibid.*

<sup>9</sup> [1963] E.C.R. 1, at 13.

<sup>10</sup> *Ibid.*

<sup>11</sup> [1964] E.C.R. 585, at 589.



Member States and which their courts are bound to apply.<sup>12</sup>

By creating a Community of unlimited duration, having its own institutions, its own personality, its own legal capacity and capacity of representation on the international plane and, more particularly, real powers stemming from a limitation of sovereignty or a transfer of powers from the States to the Community, the Member States have limited their sovereign rights, albeit within limited fields, and have thus created a body of law which binds both their nationals and themselves.<sup>13</sup>

It follows from the *Van Gend & Loos* and *Costa v. ENEL* judgments that a Treaty provision may always produce direct effect in an appropriate case, as a consequence of the very nature of the European Community. Whether a particular provision does in fact enjoy such an effect will depend on its wording and its place in the general scheme of the Treaty. It is noteworthy that the Court stresses the difference between the EC Treaty and ordinary international treaties. The EC Treaty created more than merely mutual obligations between States. The Community institutions have legislative powers of their own, independent of those of the Member States, as well as powers of political and legal control. In the *Costa v. ENEL* Case the Court of Justice referred to the Community legal system as being accepted by the Member States "on a basis of reciprocity". It therefore follows that the very basis of the Community legal order is reciprocity or, in other words, mutual obligations between the Member States. The Community legal system, however, also transcends mere reciprocity. The horizontal duties of the Member States *inter se* reflect the international law principle of reciprocity, but this principle is combined with the Community law principle of solidarity laid down in Article 5 of the EC Treaty, which is that the Treaty forms "a foundation for something more than a loose partnership of States involved in a joint economic enterprise. The Treaty is not a mere contractual compact, it is an institutional stage of European unity".<sup>14</sup>

The fact that the EC Treaty established its own legal order has important consequences for the Member States. As discussed in the previous chapter, the judges of these States, in applying Community law, cannot simply apply the incorporation rules that they are used to, since the validity of Community law would vary too much from Member State to Member State. In The Netherlands, for example, a judge would always be required to respect Community law, even if subsequent domestic legislation were contrary to it, while in Italy

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<sup>12</sup> [1964] E.C.R. 585, at 593.

<sup>13</sup> *Ibid.*

<sup>14</sup> See D. Lasok and J.W. Bridge, *Law and Institutions of the European Communities* (5th ed. 1991), p. 31.

or Germany this would not be the case. Such a situation clearly would be incompatible with the objectives of the Community.<sup>15</sup> For example, it is not inconceivable that Member States, primarily for reasons of national politics, would like to duck their Community obligations from time to time. In Member States like Italy and Germany, domestic legislation easily could frustrate the whole process of implementing the Treaty in a specific field. Such conduct would obviously not inspire the other Member States to remain faithful to the Treaty. These States might then feel forced to take action to defend themselves against the detrimental effects of Treaty violations. An important feature of Community authority is therefore its uniformity resulting from equal enforcement in all Member States,<sup>16</sup> whereby the instruments of enforcement are not only Articles 169 and 170, but also Article 177 of the EC Treaty. The Court of Justice considers 'direct effect' an additional tool to achieve compliance with Community law by the Member States.

### *C. The Direct Effect of International Agreements*

#### 1. The Legal Nature of International Agreements

In discussing the legal nature of international agreements, five cases seem to be of particular relevance: *Bresciani*,<sup>17</sup> *Kupferberg*,<sup>18</sup> *Pabst & Richarz*,<sup>19</sup> *Sevince*,<sup>20</sup> and *Kziber*.<sup>21</sup> We thus will take a closer look at, respectively, the Yaoundé Convention of Association between the Community and certain African States and Madagascar, the Free Trade Agreement between the Community and Portugal, the Agreement of Association between the Community and

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<sup>15</sup> See Ch. Sasse, 'The Common Market: Between International and Municipal Law', 75 Yale L.J. 695 (1966), p. 727.

<sup>16</sup> See Sasse, *supra* note 15, at 728.

<sup>17</sup> Case 87/75 *Conceria Daniele Bresciani v. Amministrazione Italiana delle Finanze*, [1976] E.C.R. 129.

<sup>18</sup> Case 104/81 *Hauptzollamt Mainz v. C.A. Kupferberg & Cie.*, [1982] E.C.R. 3641.

<sup>19</sup> Case 17/81 *Pabst & Richarz KG v. Hauptzollamt Oldenburg*, [1982] E.C.R. 1331.

<sup>20</sup> Case C-192/89 *S.Z. Sevince v. Staatssecretaris van Justitie*, [1990] E.C.R. I-3461.

<sup>21</sup> Case C-18/90 *Office national de l'emploi (Onem) v. Bahia Kziber*, [1991] E.C.R. I-199.

Greece, the EC-Turkey Association Agreement, and the Cooperation Agreement between the EC and Morocco.

### 1.1 Reciprocity as an Initial Balance of Obligations

When, in 1969 and 1970, the Conceria Bresciani of Genoa imported consignments of raw cow-hides from France and Senegal, the Italian customs authorities charged a veterinary and public health inspection duty on these importations. The duty was introduced by Italy to offset the cost of the compulsory public health inspection of imported products of animal origin. Similar products of domestic origin were not subject to the same duty, but whenever animals are slaughtered in Italy there are veterinary inspections for which local authorities charge duties. The main purpose of these inspections is to establish whether the meat is fit for consumption. Arguing that the duty in question was incompatible with the prohibition laid down in Article 13(2) of the EC Treaty in respect of the importations from France and in Article 2(1) of the Yaoundé Convention of 1969 in respect of the importations from Senegal, Bresciani brought an action before the Tribunale di Genua for repayment of the duty. This court referred certain questions to the Court of Justice for a preliminary ruling under Article 177 of the EC Treaty. One of these questions was whether Article 2(1) could have direct effect. It was not self-evident at all that the treaty as such could have direct effect, since the obligations under the Convention were clearly not the same for the Community and the Associated States. There was no initial balance of obligations. The Court, however, held that "this imbalance between the obligations assumed by the Community towards the Associated States, which is inherent in the special nature of the Convention, does not prevent recognition by the Community that some of its provisions have a direct effect".<sup>22</sup>

In *Kupferberg*, Advocate-General Rozes referred to the *Bresciani* judgment and argued that the Court of Justice "recognized various provisions of the 1973 Yaoundé Convention as having direct effect since that Convention was not based on reciprocity but was intended to confer special advantages on certain African countries and to Madagascar. On the other hand, it is not possible to speak of any such lack of reciprocity with regard to the Agreement between the EEC and Portugal which is based on the principle of strict equality".<sup>23</sup> According to

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<sup>22</sup> [1976] E.C.R. 129, at 141 (paragraph 23).

<sup>23</sup> [1982] E.C.R. 3641, at 3673.

Advocate-General Rozes, this was one of the main reasons why the EC - Portugal Agreement could not have direct effect. Did Advocate-General Rozes claim that a lack of reciprocity is a condition for recognition of direct effect? Marc Maresceau has argued that Advocate-General Rozes considerations did constitute a paradox: agreements without reciprocity can have direct effect, agreements based on reciprocity cannot.<sup>24</sup> If one would start from the assumption that a lack of reciprocity is an obstacle to the recognition of direct effect, since a balance between obligations must be considered a minimum condition, the following parallel with the situation within the Community could be drawn.

In the Community, the balance between obligations is the very foundation of the relationship between the Member States. This follows from the *Costa v. ENEL* judgment in particular, where the Court stated that the Community legal system is accepted by the Member States "on a basis of reciprocity". Clearly, the Community is more than that. The Court had already made clear, in *Van Gend & Loos*, that the objective of the EEC Treaty implies "that this Treaty is more than an agreement which merely creates mutual obligations between the contracting States". The Community legal order is not only based on reciprocity, but also on solidarity between the Member States. Indeed, a solidarity which is necessary to achieve the goals described in the Treaty.<sup>25</sup> This does not mean, however, that in the Community solidarity has replaced reciprocity; the balance between obligations is still there. The Community legal order, however, transcends mere reciprocity. The Yaoundé Convention, on the other hand, was not even based on reciprocity, there was a clear imbalance between obligations. In the view that reciprocity is a minimum condition, direct effect would have been out of the question. The only reason it was granted was the special link between the African States and Madagascar, on the one hand, and the European Community, on the other. This display of 'extra-territorial solidarity' satisfied both the Advocate-General and the Court of Justice. In Advocate-General Rozes' opinion no such solidarity could be found in the EC - Portugal Agreement and therefore this agreement remained a simple free-trade agreement, based on not more than mere reciprocity which was, in her view, not enough to grant direct effect. She probably did not intend to say, however, that an agreement which is less than an agreement

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<sup>24</sup> See M. Maresceau, 'De werking van overeenkomsten tussen de EEG en derde Staten volgens de rechtspraak van het Hof van Justitie na het arrest Kupferberg', in: *II Liber Amicorum Frederic Dumon* 1183 (1983), pp. 1197/1198.

<sup>25</sup> See, e.g., Case 39/72 *Commission v. Italian Republic*, [1976] E.C.R. 277, at 284. Case 78/76 *Steinike & Weinlig v. Federal Republic of Germany*, [1977] E.C.R. 595, at 612. Case 128/78 *Commission v. United Kingdom*, [1979] E.C.R. 419, at 429.

based on mere reciprocity can have direct effect. Probably, it also was her view that if a simple reciprocal agreement cannot have direct effect, then - *a fortiori* - an agreement which does not even satisfy that criterion cannot have direct effect either. However, if there is an acceptable 'substitute', going beyond mere reciprocity, direct effect is indeed conceivable. This substitute was the 'extra-territorial solidarity' recognized by the Court, the special link between the Community and the Associated States. Since the Portugal Agreement is based on strict reciprocity and not more than that, the Advocate General argued, it cannot have direct effect.

In *Kupferberg*, the Court did not agree with Advocate General Rozes' point of view. It stated that the nature of the Agreement may not "prevent a trader from relying on the provisions of the said Agreement before a court in the Community".<sup>26</sup> This conclusion was based on considerations regarding reciprocity in judicial control by the courts and therefore will be considered in more detail below. Implicitly, however, the Court also recognized that the mere reciprocity on which the EC-Portugal Agreement was based could not prevent direct effect. It recognized that a simple free-trade agreement can produce direct effect and it appears that a special link with the Community is not necessary. Or was the special link perhaps the fact that Portugal had already applied for membership in 1977 and was likely to accede at some point in the near future? In that case, it could be argued perhaps that there existed a kind of 'anticipated solidarity', that is, another substitute transcending mere reciprocity.

In the *Pabst & Richarz* Case the facts were as follows. In order to adapt its monopoly in spirits to the requirements of Community law, the German Federal Monopoly Administration abolished the monopoly in the importation of spirits which it held under German law with regard to spirits coming from other Member States. The reduction in the selling prices of monopoly spirits which followed these measures caused a deficit for the Monopoly, since the purchase prices payable to producers delivering their products to it were left unchanged. The deficit was met from the State budget and this caused an increase of 10% in the general rate of the tax on spirits. In order to let producers, manufacturers and importers of spirits adapt to the new situation, the Federal Minister of Finance laid down administrative instructions which contained measures of relief. The company Pabst & Richarz KG owned an establishment distilling spirits from wine. It had a spirits warehouse and also a storage tank. When certain spirits from France, Italy and Greece entered the warehouse, Pabst & Richarz

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<sup>26</sup> [1982] E.C.R. 3641, at 3665 (paragraph 22).

paid the relevant duty, which then was refunded to it. In its application to the Finanzgericht Hamburg, however, Pabst & Richarz claimed supplementary relief in respect of the raw spirits held in their storage tank. The company based its claim on the argument that the relief system constituted a discrimination between, on the one hand, monopoly spirits which could qualify for a reimbursement without previously having been subject to taxation and, on the other, imported spirits in respect of which the reimbursement was intended to compensate for the previous payment of a duty. In the view of Pabst & Richarz, this discriminatory aspect of the relief system infringed Article 95 of the EC Treaty and, in so far as spirits imported from Greece were concerned, the similarly worded Article 53(1) of the Association Agreement between the European Community and Greece. The Finanzgericht Hamburg decided to stay the proceedings in order to refer questions to the Court of Justice for a preliminary ruling under Article 177.

The question we are concerned with here is the one relating to Article 53(1) of the EC - Greece Association Agreement. According to Advocate-General Rozes, Article 53(1) was directly effective since, *inter alia*, the objectives of the Association Agreement showed that this agreement was far more than a free-trade agreement of the classical type. In the preamble to the Agreement, the contracting parties announced that they wished "to establish ever-closer bonds between the Greek people and the peoples brought together in the EEC" in order to prepare the accession of Greece to the Community.<sup>27</sup> The Court agreed and granted direct effect to Article 53(1) of the Association Agreement, partly on the grounds that this provision "forms part of a group of provisions the purpose of which was to prepare for the entry of Greece into the Community".<sup>28</sup> It therefore "follows from the wording of Article 53(1), ..., and from the objective and nature of the Association Agreement of which it forms part that that provision precludes a national system of relief from providing more favourable tax treatment for domestic spirits than for those imported from Greece".<sup>29</sup> It could be argued that, again, there was a special link with the Community. In addition to the reciprocity of the agreement, the balance between obligations, the Court recognized an anticipated solidarity in view of the fact that Greece had meanwhile acceded to the Community.

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<sup>27</sup> [1982] E.C.R. 1331, at 1359.

<sup>28</sup> [1982] E.C.R. 1331, at 1350 (paragraph 26).

<sup>29</sup> [1982] E.C.R. 1331, at 1350 (paragraph 27).

In *Sevince*, after having stated that the provisions of the decisions of the EC-Turkey Association Agreement were clear, precise and unconditional, and therefore were capable of having direct effect, the Court of Justice held that this finding was "confirmed by the purpose and nature of the decisions of which those provisions form part and of the Agreement to which they relate".<sup>30</sup> Referring to the *Demirel* Case, it held that the purpose of the Association Agreement was:

to promote the continuous and balanced strengthening of trade and economic relations between the parties, and it establishes between the European Economic Community and Turkey an association which provides for a preparatory stage to enable Turkey to strengthen its economy with aid from the Community, a transitional stage for the progressive establishment of a customs union and for the alignment of economic policies, and a final stage based on the customs union and entailing close coordination of economic policies.<sup>31</sup>

In this case as well, an anticipated solidarity (or perhaps only extra-territorial solidarity since it is still unlikely that Turkey ever will accede to the Community) was recognized and emphasized by the Court. There exists a special link between the Community and Turkey. The association provides for a preparatory stage to enable Turkey to strengthen its economy with Community aid, for a transitional stage to progressively establish a customs union and for the alignment of economic policies, and a final stage based on the customs union and involving the close coordination of economic policies.

The background of the *Kziber* Case may be described as follows. Ms. Bahia Kziber, a Moroccan national, lives with her parents in Belgium. Her father, also of Moroccan nationality, who had worked as a wage-earner in Belgium, is now a pensioner there. When Ms. Kziber applied for a special unemployment allowance the Belgian authority, the Office national de l'emploi (Onem), refused to grant the allowance on the ground of her nationality. After the Tribunal du travail of Liege had annulled that decision, Onem brought an appeal before the Court du travail of Liege. Ms. Kziber relied on the provisions of Article 41(1) of the EC-Morocco Cooperation Agreement, prohibiting, in the field of social security, discrimination based on nationality between, on the one hand, workers of Moroccan nationality and any members of their families living with them and, on the other, nationals of the Member States in which they are employed. Realizing that the matter involved an interpretation of the EC-Morocco Agreement, the Court du Travail stayed the proceedings and asked the Court of Justice for a preliminary ruling.

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<sup>30</sup> [1990] E.C.R. I-3461, at I-3502 (paragraph 19).

<sup>31</sup> [1990] E.C.R. I-3641, at I-3502/3503 (paragraph 20).

In his assessment of the purpose and nature of the EC-Morocco Cooperation Agreement, Advocate-General Van Gerven argued that the Cooperation Agreement was far less characterized by inequality of obligations than the Yaoundé Convention in *Bresciani* and that the Court "even in that case" had recognized direct effect. Therefore, the Cooperation Agreement *a fortiori* should be considered to have direct effect in principle.<sup>32</sup> Although the Court recognized the direct effect of Article 41(1), it did not explicitly refer to the *Bresciani* Case. In appraising the purpose and nature of the Cooperation Agreement, it first mentioned its object which is to promote overall cooperation between the Community and Morocco, especially in the field of labour, and subsequently stated that "the fact that the Agreement is intended essentially to promote the economic development of Morocco and that it confines itself to instituting cooperation between the Parties without referring to Morocco's association with or future accession to the Communities is not such as to prevent certain of its provisions from being directly applicable".<sup>33</sup> Again, the Court stressed the special link between the Community and its partner in the agreement. An 'implied extra-territorial solidarity', expressed by the establishment of a framework to promote the economic development of Morocco, was held sufficient to recognize the direct effect in principle of the treaty in question.

## 1.2 Reciprocity in Enforcement

The fact that the courts of other contracting parties have adopted a different approach towards the international agreement, that is, have denied direct effect or interpreted the agreement in a certain way, or the fact that there is uncertainty surrounding this issue, may be relevant to the question whether direct effect should be granted. This matter also may be perceived in terms of reciprocity, that is, reciprocity in enforcement, or reciprocity in the judicial control of the implementation of the agreement. In *Polydor*,<sup>34</sup> where also provisions of the EC-Portugal Agreement were invoked, Advocate-General Rozes pointed to judgments of courts in certain other EFTA-countries whereby the interpretation suggested by the defendants had been rejected. It also had appeared from these proceedings that in one case, in a judgment of the Swiss Federal Supreme Court, provisions equivalent to Articles 14(2)

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<sup>32</sup> [1991] E.C.R. I-199, at I-212.

<sup>33</sup> [1991] E.C.R. I-199, at I-226 (paragraph 21).

<sup>34</sup> Case 270/80 *Polydor Limited and RSO Records Inc. v. Harlequin Record Shops Limited and Simons Records Limited*, [1982] E.C.R. 329.



and 23 had been denied direct effect.<sup>35</sup> The Advocate-General therefore warned that reciprocity was not guaranteed.<sup>36</sup> In *Kupferberg*, Advocate-General Rozes again stressed that to recognize the direct effect of a certain provision of the EC-Portugal Agreement without the guarantee that this provision would be interpreted in the same way (or even would have direct effect in the first place) would, because of this absence of reciprocity, lead to a disadvantageous position for the Community not corresponding to the intention of the contracting parties.<sup>37</sup> In its *Kupferberg* judgment, however, the Court explicitly rejected this point of view:

In conformity with the principle of public international law Community institutions which have power to negotiate and conclude an agreement with a non-member country are free to agree with that country what effect the provisions of the agreement are to have in the internal legal order of the contracting parties. Only if that question has not been settled by the agreement does it fall for decision by the courts having jurisdiction in the matter, and in particular by the Court of Justice within the framework of its jurisdiction under the Treaty, in the same manner as any question of interpretation relating to the application of the agreement in the Community.<sup>38</sup>

According to the general rules of international law there must be bona fide performance of every agreement. Although each contracting party is responsible for executing fully the commitments which it has undertaken it is nevertheless free to determine the legal means appropriate for attaining that end in its legal system unless the agreement, interpreted in the light of its subject-matter and purpose, itself specifies those means. Subject to that reservation the fact that the courts of one of the parties consider that certain of the stipulations in the agreement are of direct application whereas the courts of the other party do not recognize such direct application is not in itself such as to constitute a lack of reciprocity in the implementation of the agreement.<sup>39</sup>

In other words, a possible lack in enforcement of treaty obligations in the territory of the other contracting parties is not sufficient ground to deny Community traders the right to invoke provisions of the treaty in Community courts. Just as mere reciprocity is no impediment to recognition of direct effect, lack of reciprocity in enforcement by courts of third countries is no impediment to such recognition.

It is noteworthy that the Court of Justice considered that if judicial enforcement of an international agreement is considered inappropriate, the Community institutions must make the effort to exclude it. The Court thus distinguishes between the direct effect of Community

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<sup>35</sup> Judgment of the Swiss Federal Court of 25 January 1979, *Sunlight AG v. Bosshard Partners Intertrading*, [1980] 3 C.M.L.R. 664. See H. Lingl, 'International Trade: Conflict Between Swiss Trademark Law and EEC Trade Agreements', 21 Harv. Int'l L.J. 756 (1980).

<sup>36</sup> [1982] E.C.R. 329, at 354.

<sup>37</sup> [1982] E.C.R. 3641, at 3674.

<sup>38</sup> [1982] E.C.R. 3641, at 3663 (paragraph 17).

<sup>39</sup> [1982] E.C.R. 3641, at 3663/3664 (paragraph 18).

law proper and international agreements, by leaving to the Council and the Commission the possibility of excluding judicial review of international agreements. In Community law, the general principles of the Treaty do not allow for such discretion.<sup>40</sup> As the Court made clear in the *Les Verts* Case, "the European Economic Community is a Community based on the rule of law, inasmuch as neither its Member States nor its institutions can avoid a review of the question whether the measures adopted by them are in conformity with the basic constitutional charter, the Treaty".<sup>41</sup> It is questionable, however, whether the Community institutions should be allowed such discretion in the case of international commitments. Judicial review also serves to ensure the Community institutions' respect for these commitments and would further strengthen the 'Rule of Law' on which the Community is based.

## 2. The Structure of International Agreements

### 2.1 Safeguard Provisions

The existence and stringency or flexibility of safeguard clauses in an international agreement may be important in assessing such agreements in respect of their suitability to produce direct effect. In *Bresciani*, Advocate-General Trabucchi argued that the safeguard provision of Article 2 of the Yaoundé Convention made the power to derogate from it subject to substantive rules and to well-defined procedural requirements. Recourse to the safeguard clause was allowed only as an exceptional measure, in case of serious difficulties, and subject to clearly defined conditions. This was couched in terms comparable to those of the safeguard provision in Article 226 of the EC Treaty. Furthermore, even in case such measures were in fact taken by Member States in respect of contracting parties to the Yaoundé Convention, they were subject to prior approval by the Community. This would guarantee that the legality of these measures was always subject to review by the Court of Justice.<sup>42</sup> The Court of Justice, however, did not find it necessary to refer in its judgment to the safeguard clause provided for under the Convention. In *Kupferberg*, intervening governments pointed out that certain provisions allowed for safeguard measures, whereby the evaluation of the difficulties

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<sup>40</sup> See J.H.J. Bourgeois, 'Effects of International Agreements in European Community Law: Are the Dice Cast?', 82 Mich. L. Rev. 1250 (1984), p. 1265.

<sup>41</sup> Case 294/83 *Parti Ecologiste "Les Verts" v. European Parliament*, [1986] E.C.R. 1339, at 1365.

<sup>42</sup> [1976] E.C.R. 129, at 149/150.

was left to the contracting party relying on them. Indeed, when no agreement could be reached within the Joint Committee, the parties were free to adopt any safeguard measures they considered necessary. In their view, this flexible safeguard clause seriously weakened the structure of the Portugal Agreement.<sup>43</sup> The Court, however, attached no importance to the various arguments and held:

As regards the safeguard clauses which enable the parties to derogate from certain provisions of the agreement it should be observed that they apply only in specific circumstances and as a general rule after consideration within the joint committee in the presence of both parties. Apart from specific situations which may involve their application, the existence of such clauses, which, moreover, do not affect the provisions prohibiting tax discrimination, is not sufficient in itself to affect the direct applicability which may attach to certain stipulations in the agreement.<sup>44</sup>

In its observations in the *Sevince* Case, the Dutch Government had argued that the provisions in question could not have direct effect, *inter alia*, because the decisions 2/76 and 1/80 contained safeguard clauses precluding such effect. It took the view that these safeguard clauses were different than the ones 'approved of' by the Court in the *Kupferberg* judgment. Application of those clauses were subject to prior examination by a Joint Committee. The safeguard clauses of decisions 2/76 and 1/80, on the other hand, gave the contracting parties a unilateral power of derogation.<sup>45</sup> The Court, however, shared Advocate-General Darmon's opinion. Mr. Darmon had argued that it did not follow from the terms of the *Kupferberg* judgment that, when prior consultation was not necessary, direct effect had to be excluded. In *Kupferberg*, the Advocate-General claimed, the Court had stated that "as a general rule" there was prior consultation within the joint committee, but not in all cases. The judgment, however, had stressed the special circumstances of the situation in which safeguard clauses could be applied, and these special circumstances were also evident in the safeguard clauses of decisions 2/76 and 1/80.<sup>46</sup> The Court of Justice agreed. It also referred to the *Kupferberg* judgment and held that:

As regards the safeguard clauses which enable the contracting parties to derogate from the provisions granting certain rights to Turkish workers duly registered as belonging to the labour force of a Member State, it must be observed that they apply only to specific situations. Otherwise than in the specific situations which may give rise to their application, the existence of such clauses is not in itself liable to affect the direct applicability inherent in the provisions from which they allow derogations.<sup>47</sup>

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<sup>43</sup> [1982] E.C.R. 3641, at 3651.

<sup>44</sup> [1982] E.C.R. 3641, at 3664 (paragraph 21).

<sup>45</sup> [1990] E.C.R. I-3461, at I-3468.

<sup>46</sup> [1990] E.C.R. I-3461, at I-3486.

<sup>47</sup> [1990] E.C.R. I-3461, at I-3504 (paragraph 25).

Despite the fact that the safeguard clauses of both the Portugal Agreement and the Turkey Agreement enabled the parties, under certain circumstances, to unilaterally derogate from obligations under these agreements, the Court of Justice did not attach any importance to this flexibility of the clauses and held that it was sufficient that the clauses only could be invoked in special situations. The mere existence of these flexible clauses could not result in a denial of direct effect of the agreements.

## 2.2 Dispute Settlement Procedures

The fact that an international agreement contains a *traditional* mechanism for the settlement of disputes which may arise between the contracting parties, as opposed to a mechanism comparable to the more rigid procedures of the EC Treaty, and the strictness of such procedures, also may be of relevance in assessing whether an international agreement can produce direct effect. The Court, however, has not always been consistent in stating its arguments for and against direct effect in respect of this matter. In *Bresciani*, for example, the Court did not bother to mention the Arbitration Court of Association for the settlement of disputes between the Community and an Associated State or a Member State and an Associated State. And although in *Pabst* Advocate-General Rozes had pointed out that the Association Agreement arranged for dispute settlement, not only by reference to the Council of Association but also by bringing these disputes before the national courts (including the possibility of submitting the matter to the Court of Justice),<sup>48</sup> the Court ignored this institutional aspect in its judgment and thus seemed to attach no particular importance to it. In *Kziber*, Advocate-General Van Gerven had argued that although the Cooperation Agreement provides for a dispute settlement procedure which does not require the parties to submit their disputes to the Court of Justice, it does provide for a compulsory settlement of disputes by way of arbitration. Since as regards this dispute settlement procedure it contains even stricter provisions than the Portugal Agreement, direct effect could not, in principle, be excluded.<sup>49</sup> Again, however, the Court did not address the issue.

Through the mechanism of Articles 169, 170, and 177 of the EC Treaty, the Court of Justice ensures a uniform interpretation and application of Community law and in *Kupferberg* the

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<sup>48</sup> [1982] E.C.R. 3641, at 3650/3651.

<sup>49</sup> [1991] E.C.R. I-199, at I-213.

Danish and French Governments argued that the Portugal Agreement was characterized by flexibility, since it did not have a legal system such as that of the Community which can ensure uniform application. The Articles 30 and 32 to 34 provided only for traditional dispute settlement procedures, whereby a Joint Committee was established to ensure due implementation of the Agreement. These procedures could not work if courts were free to interpret the obligations under the Agreement.<sup>50</sup> Also one of Advocate-General Rozes' arguments against direct effect was that recognition of direct effect would lead to interference of court decisions with decisions by the Joint Committee. The process of a political decision aimed for by the Contracting Parties would in that case be transferred to the judiciary, and conflicting decisions given by national courts would give rise to an imbalance in the implementation of the Agreement.<sup>51</sup> The Court of Justice explicitly refuted all these arguments:

The mere fact that the contracting parties have established a special institutional framework for consultations and negotiations inter se in relation to the implementation of the agreement is not in itself sufficient to exclude all judicial application of that agreement. The fact that a court of one of the parties applies to a specific case before it a provision of the agreement involving an unconditional and precise obligation and therefore not requiring any prior intervention on the part of the joint committee does not adversely affect the powers that the agreement confers on that committee.<sup>52</sup>

The EC Treaty is more than a treaty which merely creates mutual obligations between the contracting parties and at first it seemed that the Court of Justice was only prepared to grant direct effect to international agreements of a similar nature, or in cases where a 'special link' could be established. In *Kupferberg*, however, the Court recognized the direct effect of a simple reciprocal free trade agreement. This judgment seems to indicate that the Court does not attach too much importance to the different 'reciprocity' aspects of the legal nature of an international agreement when considering its capacity to produce direct effect. Furthermore, and not surprisingly, the structures of all international agreements which have been under the Court's scrutiny are weaker than the structure of the EC Treaty. The Court, however, has made explicitly clear that neither the possibility to unilaterally derogate from the agreement through the invocation of a safeguard clause nor the existence of a potentially interfering dispute settlement procedure are sufficient reason to deny direct effect to the provisions of such an agreement.

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<sup>50</sup> [1982] E.C.R. 3641, at 3651.

<sup>51</sup> [1982] E.C.R. 3641, at 3676.

<sup>52</sup> [1982] E.C.R. 3641, at 3664 (paragraph 20).

### *D. The Direct Effect of GATT*

In 1972, the Court of Justice delivered judgment in the *Third International Fruit Company Case*.<sup>53</sup> As stated previously, the Court felt that it was obliged to examine whether the validity of acts of the Community institutions could be affected because of incompatibility with a rule of international law.<sup>54</sup> The Court declared that international norms indeed can have such force. However, two conditions must be met. First, before the incompatibility of a Community measure with a provision of international law can affect the validity of that measure, the Community must be bound by that provision.<sup>55</sup> Second, before invalidity can be relied upon before a national court, the provision of international law must be capable of conferring rights on citizens of the Community which they can invoke before the courts,<sup>56</sup> in other words, the provision must be directly effective. In order to determine whether GATT provisions are capable of conferring rights on individuals of which they may avail themselves in court, the Court of Justice invoked its well-known test. It examined the spirit, general scheme and terms of the General Agreement.<sup>57</sup> Indeed, the same "purpose-oriented interpretive formula" utilized in *Van Gend & Loos* and *ERTA*.<sup>58</sup> It subsequently denied direct effect to GATT on the grounds that:

this agreement which, according to its preamble, is based on the principle of negotiations undertaken on the basis of 'reciprocal and mutually advantageous arrangements' is characterized by the great flexibility of its provisions, in particular those conferring the possibility of derogation, the measures to be taken when confronted with exceptional difficulties and the settlement of conflicts between the contracting parties.<sup>59</sup>

The Court confirmed its ruling of the *Third International Fruit Company Case* in subsequent judgments. In 1973, the *Schlüter Case*<sup>60</sup> came before the Court. The background of this case

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<sup>53</sup> Joined Cases 21-24/72 *International Fruit Company and Others v. Produktschap voor Groenten en Fruit*, [1972] E.C.R. 1219.

<sup>54</sup> [1972] E.C.R. 1219, at 1226 (paragraph 6).

<sup>55</sup> [1972] E.C.R. 1219, at 1226 (paragraph 7).

<sup>56</sup> [1972] E.C.R. 1219, at 1226 (paragraph 8).

<sup>57</sup> [1972] E.C.R. 1219, at 1226 (paragraph 20).

<sup>58</sup> See E. Stein, 'External Relations of the European Community: Structure and Process', in: *Collected Courses of the Academy of European Law* 115 (1990), p. 171.

<sup>59</sup> [1972] E.C.R. 1219, at 1226 (paragraph 21).

<sup>60</sup> Case 9/73 *Carl Schlüter v. Hauptzollamt Lörrach*, [1973] E.C.R. 1135.

was as follows. The organization of agricultural markets in the Community is founded on a stable price system. Target, threshold and intervention prices are determined on the basis of fixed parities for the currencies of the various Member States by reference to a single unit of account. In the first months of 1971, the Council allowed Germany and The Netherlands to float their currencies, because an increasing inflow of foreign currency and short-term speculative capital produced harmful effects in these two Member States. This floating, however, caused serious disturbances in agricultural trade which were detrimental to producers. Therefore, the Council introduced a system of compensatory amounts which Germany and the Netherlands would be authorized to charge on imports and grant on exports in their trade both with other Member States and with third countries. When the Osnabrück firm of Carl Schlüter imported 7000 kg of Emmental and Gruyere cheese from Switzerland into Germany, and was thereby charged compensatory amounts, it brought an action before the Finanzgericht Baden-Württemberg. One of Schlüter's arguments, to which we confine ourselves here, was that the rate of custom duty imposed on Emmental and Gruyere cheese had been bound within the framework of GATT and that the duty should therefore be limited to the amount resulting from that binding. To the extent of the excess, the levy was established in breach of Article II of GATT. In Schlüter's view, Article II constituted a clear and unreserved rule, which can be invoked by private parties.<sup>61</sup> The Court, however, did not agree and again denied direct effect of GATT *in toto*. In its judgment, reminiscent of *Third International Fruit Company*, the Court held that:

a particular feature of this Agreement, founded - according to the preamble - on the principle of negotiations undertaken on a 'reciprocal and mutually advantageous basis', is the broad flexibility of its provisions, especially those concerning deviations from general rules, measures which may be taken in case of exceptional difficulty, and the settling of differences between the contracting parties.<sup>62</sup>

In the three judgments of 16 March 1983, *SIOT*<sup>63</sup>, *SPI/SAMI*<sup>64</sup> and *Singer and Geigy*<sup>65</sup>, the

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<sup>61</sup> [1973] E.C.R. 1135, at 1142.

<sup>62</sup> [1973] E.C.R. 1135, at 1157 (paragraph 29).

<sup>63</sup> Case 266/81 *Società Italiana per l'Oleodotto Transalpino (SIOT) v. Ministero delle Finanze, Ministero della Marina Mercantile, Circonscrizione doganale di Trieste and Ente Autonomo del Porto di Trieste*, [1983] E.C.R. 731.

<sup>64</sup> Joined Cases 267-269/81 *Amministrazione delle Finanze dello Stato v. Società Petrolifera Italiana SpA (SPI) and SpA Michelin Italiana (SAMI)*, [1983] E.C.R. 801.

<sup>65</sup> Joined Cases 290 and 291/81 *Compagnia Singer SpA and Geigy SpA v. Amministrazione delle Finanze dello Stato*, [1983] E.C.R. 847. As in the *SPI/SAMI* Case, the two companies Singer and Geigy also challenged the charges for administrative services. According to the ECJ, the questions referred to it

Court of Justice again reaffirmed, and thus firmly established, its case-law concerning the effect of GATT in Community law. In *SIOT*, the relevant question in this context was whether the imposition of charges on oil intended for Austria was compatible with Article V of GATT on the freedom of transit, considering the fact that the Community is bound in respect of this GATT contracting party. In *SPI/SAMI*, the companies argued that the introduction of new charges, such as the duty for administrative services, was incompatible with several provisions, in particular the combined provisions of the GATT Preamble and Articles II(1)(b), III(2), VI and VIII of GATT, and certain GATT Tariff Protocols. In *Singer and Geigy*, this duty for administrative services was contested as well. In this case, the arguments of the two firms were confined to infringement of Article II(1)(b) GATT. In *SIOT*, the Court stated that since Article V of the GATT "cannot have direct effect in the framework of Community law for the reasons which were stated by the Court in its judgment (...) *International Fruit Company* (...), and which are still valid, individuals may not rely upon it in order to challenge the imposition of a charge such as the loading and unloading charge on goods in transit to Austria".<sup>66</sup> And in *SPI/SAMI*, the Court held that the conclusions in *Third International Fruit Company* and *Schlüter* were reached,

... on the basis of considerations concerning the general scheme of GATT, namely that it was based on the principle of negotiations undertaken on a reciprocal and mutually advantageous basis and was characterized by the great flexibility of its provisions, in particular those concerning the possibilities of derogation, the measures which might be taken in cases of exceptional difficulty and the settlement of differences between the contracting parties. The same considerations apply to the articles cited by the Corte Suprema di Cassazione.<sup>67</sup>

As noted previously, two main considerations played an important role in the determination of the suitability of the EC Treaty to produce direct effect, namely its legal nature and its structure or institutional framework. The examination of the case-law of the Court of Justice regarding the effect of international agreements in Community law showed that these issues reappear in the arguments for and against direct effect of international agreements. The final question to be answered in this section is whether these two issues also determine the effect of GATT in Community law. Was GATT meant to have direct effect in principle, or is direct effect incompatible with its legal nature? Is GATT adapted to produce direct effect, or is its structure inadequate?

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by the national court were in substance identical to the questions submitted in *SPI/SAMI* and it therefore largely repeated its rulings. For that reason, no direct reference will be made to this case in the following discussion.

<sup>66</sup> [1983] E.C.R. 731, at 780 (paragraph 28).

<sup>67</sup> [1983] E.C.R. 801, at 830 (paragraph 23).



## 1. The Legal Nature of GATT

In *Third International Fruit Company, Schlüter* and in *SIOT and SPI/SAMI*, the Court of Justice stated that "according to its preamble" the General Agreement "is based on the principle of negotiations undertaken on the basis of "reciprocal and mutually advantageous arrangements". This reference by the Court to the passage in the GATT Preamble has been heavily criticized. The phrase has been called the "troubling spot in the Court's motivation".<sup>68</sup> The same author argues that the Court should have avoided its "somewhat strained logic" and should have made a clear distinction between reciprocity in the negotiations leading up to new obligations, present in all treaties, constitutions and contracts in one way or another, and more procedural aspects of reciprocity. The Court should not have discussed the substance of the negotiations when it meant to deal with the procedural point of direct effect, that is, the possibility to invoke provisions of GATT.<sup>69</sup> According to Petersmann, the Court does not indicate whether its *ratio decidendi* is based on reciprocity as a 'principle of negotiations,' as a principle of treaty law ("reciprocal arrangements"), on reciprocity in respect of the mutual gains from trade ("mutually advantageous arrangements"), or on reciprocity as regards judicial control of the observance of directly effective GATT provisions by national courts.<sup>70</sup> Probably, the Court wanted to emphasize both GATT's objective of maintaining an overall balance of economic benefits between the parties through continuous negotiations and the possible lack in enforcement of the treaty in the territory of such important trading partners as the United States and Japan.

### 1.1 Reciprocity as an Initial Balance of Obligations

In the Preamble to GATT 1947 the contracting parties declare, firstly, that "their relations in the field of trade and economic endeavour should be conducted with a view to raising

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<sup>68</sup> See G. Wils, 'The Concept of Reciprocity in EEC Law: An Exploration Into These Realms', 28 C.M.L.Rev. 245 (1991), p. 254.

<sup>69</sup> See Wils, *supra* note 68, at 254/255. The author rightly notes that reciprocity in the sense of material or substantive equilibrium taken into account during negotiations establishing new obligations is common to private contracts, treaties and constitutions and has little distinctive or explanatory power. *Ibid*, at 251.

<sup>70</sup> See E.-U. Petersmann, 'Application of GATT by the Court of Justice of the European Communities', 20 C.M.L.Rev. 397 (1983), pp. 424/425.

standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, developing the full use of the resources of the world and expanding the production and exchange of goods" and, secondly, that they are "desirous of contributing to these objectives by entering into reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and other barriers to trade and to the elimination of discriminatory treatment in international commerce". In the Preamble to the Agreement Establishing the World Trade Organization similar language is employed but specific reference is made to the difficult position of developing countries, especially the least developed countries.<sup>71</sup> In the various Multilateral Trade Agreements ensuing from the Uruguay Round the special position of developing countries is further acknowledged. Part IV of GATT 1947 was, of course, entirely devoted to the issue of trade and development and this has now become part of GATT 1994.<sup>72</sup> Hence, although GATT's objective is to maintain an overall balance of economic benefits between the Members, the developing countries are granted exemptions. The developed Members do not expect reciprocity from the LDCs and the LLDCs.<sup>73</sup> This solidarity can be compared to the solidarity of the European Community towards several developing countries in the framework of the Yaoundé Conventions and, subsequently, Lomé, and should not constitute an obstacle *per se* to the recognition of direct effect of GATT.

The initial balance between the developed Members in particular is maintained through reciprocal negotiations. As a matter of economic policy, however, reciprocal tariff negotiations do not make much sense. Trade theory has shown that a country can gain welfare advantages even by unilaterally reducing its tariff.<sup>74</sup> According to most economists today, the conventional economic arguments for making the liberalization of national trade barriers conditional upon reciprocal trade liberalization by other countries are no longer convincing.

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<sup>71</sup> MTN/FA II. The Preamble declares that "there is need for positive efforts designed to ensure that developing countries, and especially the least developed among them, secure a share in the growth in international trade commensurate with the needs of their economic development".

<sup>72</sup> Furthermore, Article XVI:1 WTO states that: "Except as otherwise provided for under this Agreement or the Multilateral Trade Agreements, the WTO shall be guided by the decisions, procedures and customary practices followed by the CONTRACTING PARTIES of the GATT 1947 and the bodies established in the framework of the GATT 1947". Various decisions of the CONTRACTING PARTIES refer to the special situation of developing countries.

<sup>73</sup> See in particular Article XXXVI:7 of GATT.

<sup>74</sup> See, e.g., J.H. Jackson, *The World Trading System: Law and Policy of International Economic Relations* (1989), p. 123.

Frieder Roessler and Richard Blackhurst have provided conclusive analyses in this respect. They argue that under flexible exchange rates, any national balance of payments disequilibrium and unemployment resulting from unilateral trade liberalization will tend to depreciate the exchange rate, and to cause essentially the same compensatory payments and employments effects as reciprocal trade liberalization by foreign trading partners.<sup>75</sup> Most economic benefits from trade liberalization can be captured through unilateral trade liberalization without waiting for reciprocal trade liberalization by other countries.<sup>76</sup> As Diebold has noted "the depiction of tariff bargaining as a form of combat is something of a caricature: the 'concession' a country makes to another by reducing tariff is in fact a favor to itself".<sup>77</sup> Or, in the words of Culbertson: "a business transaction across a national frontier is usually, when regarded as an import, viewed with suspicion, but when regarded as an export it is considered a national boon. With all our effort toward an educated democracy we still find it difficult to escape the fallacies of the old mercantilist doctrine of favourable balances of trade and to get away, as it were, to an even start in discussing commercial policy".<sup>78</sup>

But, if unreciprocated free trade is beneficial to those who open their markets, are multilateral trade negotiations then not merely a "costly farce" which could easily be missed?<sup>79</sup> If it is true that those countries which open up most will benefit most, could they not just act unilaterally? In such a case, they do not need the GATT, and this organization could therefore be dissolved as a product of mercantilist doctrine.<sup>80</sup> There are, however, three important political arguments for reciprocal rather than unilateral trade liberalization. First, if a country's foreign trading partner is willing to open up its market only on a reciprocal basis, the country's national import barriers are a political bargaining chip for improving

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<sup>75</sup> See F. Roessler, 'The Rationale for Reciprocity in Trade Negotiations under Floating Currencies', 31 *Kyklos* 258 (1978). R. Blackhurst, 'Reciprocity in Trade Negotiations under Flexible Exchange Rates', in: J.P. Martin and A. Smith, *Trade and Payments Adjustment under Flexible Exchange Rates* (1979). See also E.-U. Petersmann, 'The Mid-Term Review Agreements of the Uruguay Round and the 1989 Improvements to the GATT Dispute Settlement Procedures', 32 *Germ. Yb. Int'l L.* 280 (1989), pp. 310/311.

<sup>76</sup> See Petersmann, *supra* note 75, at 311.

<sup>77</sup> Quoted from L. Weiss, 'Reciprocity', in: S.J. Rubin and T.R. Graham, *Managing Trade Relations in the 1980s* 165 (1982), p. 187.

<sup>78</sup> *Ibid.*

<sup>79</sup> See E. Dell, 'Of Free Trade and Reciprocity', 9 *The World Economy* 125 (1986), p. 135.

<sup>80</sup> *Ibid.*

access to the foreign market. Second, reciprocal negotiations can generate domestic political support for trade liberalization by promising export gains and rule-oriented trade policies to domestic exporters and by establishing political counterweights against domestic import-competing industries benefiting from import protection. Third, since no country can unilaterally protect the rights of its traders and investors in foreign jurisdictions, and most governments are willing to restrain their conventional foreign policy discretion only through reciprocal international legal commitments, legal disciplines on tariffs, non-tariff trade barriers and trade discrimination are easier to achieve in reciprocal international agreements.<sup>81</sup>

What is thus the incentive of governments to negotiate with other governments when the likely result is the limitation of their discretionary trade policy powers? The organizational and informational asymmetries of domestic political processes lead governments to respond primarily to requests for protection from import-competing producers. Public choice theory shows how special interest groups lobbying for import protection exert strong pressure on governments.<sup>82</sup> Export industries, however, are also capable of lobbying for political support.<sup>83</sup> International negotiations on a reciprocal basis confront producers of an importing country, who are interested in import protection, with producers of exporting countries interested in expansion of their export markets.<sup>84</sup> Since national governments cannot guarantee their export industries access to foreign markets, such access only can be secured at the international level. The main reason for governments to negotiate international trade agreements is to win domestic political support from important export industries.<sup>85</sup> Most governments certainly would prefer obtaining access to foreign markets without any commitments of their own, but this is not the way it works. Access to foreign markets must be 'bought' by offering the foreign country in question commitments for one's own trade policy. However, reciprocity never may be viewed as an exchange of economic gains, because this would suggest that liberalization entails economic costs which must be compensated for

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<sup>81</sup> See Petersmann, *supra* note 75, at 311.

<sup>82</sup> See *infra* Part 3.

<sup>83</sup> See H. Hauser, 'Foreign Trade Policy and the Function of Rules for Trade Policy Making', in: D.C. Dicke and E.-U. Petersmann (eds.), *Foreign Trade in the Present and a New International Economic Order* 18 (1988), pp. 33/34.

<sup>84</sup> See F. Roessler, 'Competition and Trade Policies. The Constitutional Function of International Economic Law', 41 *Aussenwirtschaft* 467 (1986), p. 473.

<sup>85</sup> See Hauser, *supra* note 83, at 34.

by more or less equal commitments to liberalize from other countries. As Hauser notes, "reciprocity is a concept of exchange, but it means exchange of domestic political support among governments".<sup>86</sup>

## 1.2 Reciprocity in Enforcement

What is the attitude of the courts of other contracting parties towards GATT? Have they accepted or denied direct effect? If they have denied it, would acceptance by the Community put the Community in a disadvantageous position? In the United States, the GATT provisions are probably not directly effective. In Jackson's words:

Although many of the provisions of GATT have the wording of self-executing commitments and although GATT was drawn from provisions of the draft ITO Charter that were intended to be self-executing, nevertheless, the GATT is applied only by virtue of the Protocol of Provisional Application or similar protocols of accession. Consequently, it is necessary to examine those protocols to see whether they intended a self-executing effect. An argument can be made that as applied through the protocol GATT is not self-executing. The language of the protocol is that of commitment to apply GATT, not language of immediate application.<sup>87</sup>

The European Court of Justice, however, does not employ the "intention of the parties" test. Therefore, such intention is not decisive in Community law. The Court of Justice looks rather at the "spirit, general scheme, and terms" of an international agreement.<sup>88</sup> In Japan, the Supreme Court has avoided the question of GATT's direct effect. In the *Necktie Case* producers of neckties argued that governmental restraints on the importation of silk for neckties violated certain directly effective GATT provisions. Lower courts had decided that GATT did not apply and the Supreme Court merely affirmed. Like the lower courts had done, it affirmed with very little analysis of the legal problem.<sup>89</sup> As noted in the previous section, the Court of Justice decided in *Kupferberg* that lack of reciprocity in enforcement by other courts is no impediment to recognition of direct effect of an international agreement. The argument that acceptance of GATT's direct effect in the European Community could be

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<sup>86</sup> *Ibid.*

<sup>87</sup> See J.H. Jackson, *World Trade and the Law of GATT* (1969), p. 106.

<sup>88</sup> According to Riesenfeld, "this approach is more sensible than the rather specious intent-of-the-parties test not uncommonly used in various national systems"; see S.A. Riesenfeld, 'The Doctrine of Self-executing Treaties and Community Law: A Pioneer Decision of the Court of Justice of the European Community', 67 A.J.I.L. 504 (1973), p. 507. For a different view see I. Cheyne, 'International Agreements and the European Community Legal System', E.L.Rev. 581 (1994), p. 594.

<sup>89</sup> The *Necktie Case* was decided by the Kyoto District Court in 1984. It was affirmed by the Osaka High Court in 1987 and by the Japanese Supreme Court in 1990. See J.H. Jackson, 'Status of Treaties in Domestic Legal Systems: A Policy Analysis', 86 A.J.I.L. 310 (1992), 333/334.

detrimental to the Community's position in the international arena and might frustrate the institutions in safeguarding the Community's interests presupposes that GATT rules always tie the executive's hands completely and that the Court does not have any leeway in interpreting GATT. More importantly, it presupposes that the Community's institutions exactly know how to safeguard these interests. The Court of Justice always should keep an open mind to possible improvements and never should be afraid to be the first one to make the step. As Jacques Bourgeois rightly notes, is not reinforcing the binding character of international law and thereby accepting that the room for manoeuvre vis-a-vis matters regulated at the international is reduced:

a price worth paying to have a workable international regulatory framework that does not unravel at the stage where arguably it matters most i.e where parties that are engaged in international transactions need to rely on it? Some will argue that this will result in asymmetries, in that some States, ..., would probably keep their options open. This is a fact. But some States have to show the way and as we live in an interdependent world with instant communication the chance is greater than ever that the example set by some will ultimately be followed by others.<sup>90</sup>

## 2. The Structure of GATT

Is GATT's structure, or institutional framework, weak or strong? How are its safeguard provisions worded and does the agreement contain a mechanism to ensure the uniform application of its laws?

### 2.1 Safeguard Provisions

In his Opinion delivered in the *Third International Fruit Company Case*, Advocate-General Mayras pointed to the waiver provision of Article XXV:5 of GATT 1947 as a possibility of obtaining relief to obligations under GATT and called it a "safety valve which is very wide and of very flexible application".<sup>91</sup> In *Schlüter*, Advocate-General Roemer even argued that GATT embraces the "principle of self-help".<sup>92</sup> In its judgments, the Court of Justice referred

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<sup>90</sup> See J.H.J. Bourgeois, 'International Jurisprudence and Domestic Law: Some Comments From a European Community Perspective', paper presented at the 8th Court of International Trade Judicial Conference, New York, 28 October 1992, pp. 26/27.

<sup>91</sup> [1972] E.C.R. 1219, at 1239.

<sup>92</sup> [1973] E.C.R. 1135, at 1168.

to the possibility of derogation from GATT principles. It seems safe to assume that it had in mind the Advocate-Generals' deliberations in this respect. Although it may be argued that the term 'possibility of derogation' is very wide and also comprises the safeguard clause of Article XIX, the Court clearly distinguishes between 'possibility of derogation' and 'measures which might be taken in cases of exceptional difficulty'.

### 2.1.1 Waivers

Article XXV:5 of GATT 1947 stated that "in exceptional circumstances not elsewhere provided for in this Agreement, the Contracting Parties may waive an obligation imposed upon a contracting party by this Agreement; provided that any such decision shall be approved by a *two-thirds majority of the votes cast and that such majority shall comprise more than half of the contracting parties*". It seems that it never has been all that easy to obtain a waiver under GATT. In practice, relatively few waivers have been granted to contracting parties. The provision of Article XXV:5 never has been a good example to prove the flexibility of GATT. Under the new WTO regime, it has become even more difficult to obtain a waiver. Article IX:3 WTO provides that, in exceptional circumstances, the Ministerial Conference (or the General Council acting for the Ministerial Conference), may decide to waive an obligation imposed on a Member provided that any such decision shall be approved by *three-fourths of the Members*.<sup>93</sup> A request for a waiver concerning obligations under the WTO Agreement must be submitted directly to the Ministerial Conference for consideration pursuant to the practice of decision-making by consensus. The Ministerial Conference then establishes a time-period to consider the request. Such period may not exceed ninety days. If consensus is not reached during the time-period, any decision to grant a waiver shall be taken by three-fourths of the Members. A request for a waiver concerning the Agreements on Trade in Goods, the GATS or the TRIPs Agreement must be submitted initially to the Council for Trade in Goods, the Council for Trade in Services or the Council for TRIPs, respectively, for consideration during a time-period which may not exceed ninety days. At the end of the time-period, the relevant Council submits a report to the Ministerial Conference. In addition, Article IX:4 WTO provides that:

a decision by the Ministerial Conference granting a waiver shall state the exceptional circumstances justifying the decision, the terms and conditions governing the application of the

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<sup>93</sup> But a decision to grant a waiver in respect of any obligation subject to a transition period or a period for staged implementation that the requesting Member has not performed by the end of that period, shall be made by consensus only; see note 5 to Article IX:3 WTO.

waiver, and the date on which the waiver shall terminate. Any waiver granted for a period of more than one year shall be reviewed by the Ministerial Conference not later than one year after its is granted, and thereafter annually until the waiver terminates. In each review, the Ministerial Conference shall examine whether the exceptional circumstances justifying the waiver still exist and whether the terms and conditions attached to the waiver have been met. The Ministerial Conference, on the basis of the annual review, may extend, modify or terminate the waiver.

Hence, under the WTO regime it is only possible to obtain a waiver if the request is approved by three-fourths of the Members as compared to a two-thirds majority comprising more than half of the contracting parties under the previous regime. Waivers are only granted for a limited period of time and there will be a close monitoring of the exceptional circumstances which led to the grant of the waiver.

### 2.1.2 Article XIX

Like almost all international trade agreements, GATT includes a safeguard clause. In fact, it contains a number of safeguard clauses. They permit the parties to reimpose tariffs and quantitative import restrictions otherwise prohibited by Articles II and XI. Imports may cause injury to a certain industry within an economy, even though they may in the long run and in the broader aggregate increase the welfare of that economy.<sup>94</sup> Therefore, domestic firms that compete against foreign imports may be compelled to adjust, either by improving their competitiveness or by reallocating resources into production of other products. A temporary period of relief from imports may give the domestic import-competing company the chance to take the necessary adjustment measures.<sup>95</sup> The Court's verdict was based on the bare text of Article XIX of GATT 1947. The text of Article XIX, which was modelled on the safeguard clause of the 1943 United States - Mexico Trade Agreement,<sup>96</sup> protects domestic producers against serious injury caused or threatened by import competition that is considered to be fair and allows any Member to withdraw or modify a concession or to introduce quantitative import restrictions when the following cumulative conditions are fulfilled. That is, when a

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<sup>94</sup> See Jackson, *supra* note 74, at 150.

<sup>95</sup> Although it could be argued, of course, that there are many other economic factors that may force an industry to adjust, such as change of consumer taste or change of government programs on pollution control. These factors can also entail adjustment costs, which begs the question whether adjustment caused by imports should be an excuse for government intervention while adjustment caused by other forces is not. Moreover, burdens of adjustment can be soothed by means other than import restrictions. Direct government assistance or tax cuts should rather be provided before affording relief by invoking the escape clause. See Jackson, *supra* note 74, at 151.

<sup>96</sup> See Jackson, *supra* note 74, at 153.



product is being imported in increased quantities; if the increase results from unforeseen developments and from the effect of an obligation accepted under GATT; if the increased imports cause or threaten serious injury to domestic producers of like or directly competitive products; when prior notice is given and an opportunity for prior consultations has been granted unless delay would cause serious damage which would be difficult to repair; and only when the import relief measures are temporary, confined to the extent necessary to prevent or remedy the injury, and are administered in a non-discriminatory way. It appears that the safeguard clause only could be invoked under strictly defined circumstances. The clause itself is not flexible at all, at least not more flexible than the safeguard clauses of the EC-Portugal and EC-Turkey Agreements. By saying that the safeguard clause is too flexible, the Court confuses GATT law with GATT practice. The GATT contracting parties indeed have ignored the safeguard provisions of GATT to a large extent. In the past, they have frequently resorted to relief measures outside the GATT framework without taking the safeguard clause(s) too seriously. The limited use of Article XIX contrasted with the growing number of 'grey area trade restrictions' applied without notification to GATT, without reference to the safeguard clauses and frequently in contravention of Articles I, X, XI, XIII, and XVII:1(c).<sup>97</sup>

The expression 'grey area trade restriction' cannot be accurately defined, and also the terms 'OMA', 'VRA' and 'VER' are used in different ways. It is certain, however, that they all refer to bilateral arrangements between importing and exporting countries, usually in the form of price undertakings, quantitative restrictions, surveillance systems or export forecasts. These measures have been willfully employed as a way to evade the fundamental principles of international and domestic trade and competition laws, such as transparent trade policy-making on the import side, non-discrimination, undistorted competition, and use of safeguard measures subject to substantive and procedural due process.<sup>98</sup> The in-built element of compensation of export restraints made it easier for exporting countries to accept VERs, VRAs and OMAs.<sup>99</sup> For importing countries, grey area trade measures are economically the most costly form of protectionism, since export quotas distort world market prices and their subdivision among individual exporting countries involves additional

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<sup>97</sup> See E.-U. Petersmann, 'Grey Area Trade Policy and the Rule of Law', 22 J.W.T. 23 (1988), pp. 30-34.

<sup>98</sup> See Petersmann, *supra* note 97, at 28/29.

<sup>99</sup> See Petersmann, *supra* note 97, at 29/30.

protection costs.<sup>100</sup> As noted above, most VERs, VRAs and OMAs usually are incompatible with the GATT prohibition of quantitative restrictions and the prohibition of discriminatory administration of such restrictions. The widespread recourse to VERs, VRAs and OMAs substituting transparent, non-discriminatory and GATT-conform import relief measures undermined not only international trade competition and the substantive GATT rules, but also GATT surveillance and dispute settlement mechanisms.<sup>101</sup> The alleged flexibility of the GATT safeguard clause never should have prevented the Court from granting direct effect to precise and unconditional GATT rules. Direct effect rather should have been utilized as a weapon to stop the circumvention of the safeguard clause by the Community.

The contracting parties soon realized themselves how the various grey area measures were hurting their economies and decided to bring an end to these practices. One of the primary objectives of the Uruguay Round was to stop the widespread neglect of the international legal disciplines on safeguard measures.<sup>102</sup> The Ministerial 'Punta del Este Declaration' of 20 September 1986, which launched the Uruguay Round, included safeguards as one of the subjects for negotiations:

(i) A comprehensive agreement on safeguards is of particular importance to the strengthening of the GATT system and to progress in the Multilateral Trade Negotiations. (ii) The agreement on safeguards: shall be based on the basic principles of the General Agreement; shall contain, *inter alia*, the following elements: transparency, coverage, objective criteria for action including the concept of serious injury or threat thereof, temporary nature, degressivity and structural adjustment, compensation and retaliation, notification, consultation, multilateral surveillance and dispute settlement; and shall clarify and reinforce the disciplines of the General Agreement and should apply to all contracting parties.<sup>103</sup>

The Agreement on Safeguards clarifies and reinforces the safeguard disciplines by establishing rules for the application of safeguard measures, understood to mean the measures provided for in Article XIX.<sup>104</sup> The Safeguards Agreement defines the substantive conditions of safeguard measures in more detail than Article XIX and introduces various new procedural requirements. More importantly, the Agreement on Safeguards explicitly prohibits grey area trade restrictions. Paragraph 22(b) provides that "a Member shall not seek, take or

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<sup>100</sup> See Petersmann, *supra* note 97, at 30.

<sup>101</sup> See Petersmann, *supra* note 97, at 34.

<sup>102</sup> See E.-U. Petersmann, 'The Uruguay Round Negotiations 1986-1991', in: E.-U. Petersmann and M. Hilf (eds.), *The New GATT Round of Multilateral Trade Negotiations* 501 (1991), pp. 545/546.

<sup>103</sup> BISD 33S/24.

<sup>104</sup> See paragraph 1 of the Agreement on Safeguards.

maintain any voluntary export restraints, orderly marketing arrangements or any other similar measures on the export or the import side" and that "any such measure in effect at the time of entry into force of the Agreement Establishing the WTO shall be brought into conformity with this Agreement or phased out in accordance with paragraph 23 below". According to paragraph 23, the phasing out of grey area measures shall be carried out according to timetables to be presented to the Committee on Safeguards. These timetables shall provide for all grey area measures "to be phased out or brought into conformity with this Agreement within a period not exceeding four years after the date of entry into force of the Agreement Establishing the WTO, subject to not more than one specific measure per importing Member, the duration of which shall not extend beyond December 31, 1999".<sup>105</sup> In addition, the Members have committed themselves to a phase-out of all safeguard measures taken pursuant to Article XIX of GATT 1947 that were still in existence at the date of entry into force of the Agreement Establishing the WTO "not later than eight years after the date on which they were first applied or five years after the date of entry into force of the Agreement Establishing the WTO, whichever comes later".<sup>106</sup>

It is clear that safeguard clauses in international agreements on trade liberalization always represent a link between two conflicting objectives, first, respect by governments for their commitments on trade liberalization, and, second, their concern to keep a margin of manoeuvre thus enabling them to protect the domestic market through the imposition of restrictive measures when necessary. It is difficult to make them, on the one hand, sufficiently strict so as to leave no doubt that they are to be invoked in exceptional circumstances only, and, on the other hand, sufficiently flexible in order to assure governments that they can be relied upon when appropriate.<sup>107</sup> Even the EC Treaty allows for unilateral adoption of safeguard measures under particular circumstances. Article 109i of the EC Treaty permits the unilateral adoption by Member States of safeguard measures in case of a sudden crisis in the balance of payments, only subject to an *a posteriori* control by the Commission.<sup>108</sup> The GATT contracting parties realized that GATT practice regarding safeguard measures needed to

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<sup>105</sup> For the European Community this will be the EC-Japan car arrangement; see the Annex to the Agreement on Safeguards.

<sup>106</sup> See paragraph 21 of the Agreement on Safeguards.

<sup>107</sup> See O. Long, *Law and its Limitations in the GATT Multilateral Trade System* 57 (1985).

<sup>108</sup> See also M. Waelbroeck, 'Effect of GATT within the Legal Order of the EEC', 8 J.W.T.L. 614 (1974), p. 617.

change and therefore new firm commitments were laid down in the Agreement on Safeguards. It is now for the Court to acknowledge this new commitment in its case-law concerning the direct effect of GATT.

As noted in the previous section, the Court never has considered the presence of more or less flexible safeguard clauses in international agreements reason to deny direct effect. In *Kupferberg* and *Sevince*, the Court of Justice declared that this presence was not sufficient in itself to affect the direct effect which may attach to certain provisions of the agreement. In *Third International Fruit Company*, *Schlüter*, *SIOT* and *SPI/SAMI*, however, the Court construes GATT's main safeguard clause as being too flexible to allow direct effect. There has never been any ground for such interpretation, even if one would take the view that the Court mainly wanted to address GATT practice regarding safeguard measures. In 1972, the Court could not have foreseen the proliferation of grey area trade measures. In any case, under the new regime there is even less ground to regard the safeguard clause flexible. Therefore, the Court should reconsider its restrictive stance.

## 2.2 Dispute Settlement Procedures

The fact that an international agreement contains a mere traditional mechanism for the settlement of disputes which may arise between the parties to the agreement and not a more rigid system comparable to the dispute settlement procedures of the EC Treaty, may also be of relevance in assessing whether such an agreement can produce direct effect. In *Kupferberg*, the Court held that "the mere fact that the contracting parties have established a special institutional framework for consultations and negotiations inter se in relation to the implementation of the agreement is not in itself sufficient to exclude all judicial application of that agreement".<sup>109</sup> The mere existence of a potentially interfering traditional dispute settlement system in an international agreement does not seem to disturb the Court. It is therefore surprising that it has condemned the GATT procedure as being too flexible by putting emphasis on the more diplomatic, less legalistic features of this procedure. The GATT dispute settlement procedures always have been far more sophisticated than those found in the agreements that did receive the Court's direct effect blessing. The Court, however, seems to consider the GATT procedures non-binding. Parties only have to give sympathetic consideration to a request for consultations from another party and all disputes are solved

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<sup>109</sup> [1982] E.C.R. 3641, at 3664 (paragraph 20).

through diplomatic channels. It never has been that way, although it must be admitted that the attitude of the large trading powers, most notably the European Community and the United States, may have given rise to doubt about the binding character of the dispute settlement procedures and, in a wider sense, the binding character of GATT law in general. Considering the importance of this issue for the argument developed in this chapter, a detailed description of the WTO dispute settlement procedure is required. First, however, a brief account needs to be given of the different attitudes of the large trading powers towards dispute settlement or, more in general, the different approaches which may be adopted in international economic relations.

### 2.2.1 Different Perspectives on Dispute Resolution

The different methods for the settlement of international trade disputes may be divided into two separate groups.<sup>110</sup> Firstly, there is settlement by negotiation with reference to the relative power positions of the parties. This has been called the power-oriented approach and is similar to the management approach to international economic relations.<sup>111</sup> Secondly, there are those methods pertaining to settlement by negotiation with reference to previously agreed upon norms and rules, known as the rule-oriented approach or, more broadly, the legalist model for the normative design of the international economic system.<sup>112</sup> When the first method is used in litigation between governments, the more powerful country holds the advantage, since it is in the position to influence the other by promising aid, for example, or by threatening to restrict imports on goods important to the weaker country. A weak country will not easily defy a more powerful one on whom it depends for trade.<sup>113</sup> Power-oriented techniques involve diplomats who stress the economic power of their country. The good negotiator will be able to present issues so as to favour particular results. As regards the GATT, countries in favour of the power-oriented approach view the General Agreement not

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<sup>110</sup> See Jackson, *supra* note 74, at 85.

<sup>111</sup> See F. Roessler, 'Law, De Facto Agreements and Declarations of Principle in International Economic Relations', 21 *Germ. Yb. Int'l L.* 27 (1978), p. 32. The management approach is based on the presumption that international economic relations have become too complex for hard rules and that therefore each concrete case should be dealt with on its merits. *Ibid.*

<sup>112</sup> See Roessler, *supra* note 111, at 33. Roessler distinguishes between three approaches or models; his intermediate model is the 'common law' model in which the need for the spontaneous development of new norms is emphasized.

<sup>113</sup> See Jackson, *supra* note 74, at 85/86.

as a code of conduct *per se* but more as a responsibility of the contracting parties to deal in good faith with each other in order to find, *ad hoc*, mutually acceptable solutions to trade disputes.<sup>114</sup> In the rule-oriented approach, on the other hand, the negotiating parties know that an unsettled dispute ultimately will be resolved by impartial, third-party judgments based on previously agreed upon rules. Thus, parties negotiate with reference to their respective predictions on the outcome of those judgments.<sup>115</sup>

The different approaches have been tried in practice and the management approach has led to undesired consequences. *Ad hoc* solutions to concrete problems proved to cause inconsistencies and hence insecurity, destructive to the international economic system.<sup>116</sup> The management model is based on the illusion that governments are better capable of controlling events, and will retain greater freedom, if their decisions respond to the exigences of actual situations. Governments did not always realize though that these responses to present demands always created new demands, generally undesirable, which imposed the next decision. Soon the decision-makers found themselves locked into their self-created cage.<sup>117</sup> Only the legalist model seems to be able to provide the stability and predictability so desperately needed in international economic relations. The advantages of conducting international affairs through a rule-oriented approach include less reliance on raw power and the temptation to employ this power, and fairer treatment of smaller countries. The United States is generally believed to advocate legalism, while the European Community and Japan are regarded to support the management approach or antilegalist view.<sup>118</sup> These different approaches can be explained, to some extent, by differences in domestic traditions regarding the settlement of disputes. The United States is a more litigious society than Japan, for example, where searching for consensus is preferred.<sup>119</sup> The antilegalist perspective of the

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<sup>114</sup> See W.J. Davey, 'Dispute Settlement in GATT', 11 Fordham Int'l L.J. 51 (1987), p. 66.

<sup>115</sup> See Jackson, *supra* note 74, at 86.

<sup>116</sup> See Roessler, *supra* note 111, at 37.

<sup>117</sup> See Roessler, *supra* note 111, at 36.

<sup>118</sup> See, e.g., R.A. Brand, 'Competing Philosophies of GATT Dispute Resolution in the Oilseeds Case and the Draft Understanding on Dispute Settlement', 27 J.W.T. 117 (1993), pp. 120/121.

<sup>119</sup> See P.D. Ehrenhaft, 'A U.S. View of the GATT', 14 Int'l Bus. Law. 146 (1986). R. Phan van Phi, 'A European View of the GATT', 14 Int'l Bus. Law. 150 (1986). M. Hilf, 'Settlement of Disputes in International Economic Organizations: Comparative Analysis and Proposals for Strengthening the GATT Dispute Settlement Procedures', in: E.-U. Petersmann and M. Hilf (eds.), *The New GATT Round*

European Community is largely due to the fact that the Community always has regarded the legalist approach as a possible infringement of sovereignty. Therefore, the Community executive adopted a flexible approach claiming that flexibility was the approach the GATT parties had intended. It played its role so well that it convinced the European Court of Justice that this was in fact the character of GATT law. Most problems in the GATT dispute settlement procedures have occurred in proceedings involving the United States and/or the European Community.<sup>120</sup> Therefore, the extent to which procedural improvements designed to lessen these problems have been realized, depended to a large extent on the attitude of these two powers. Meanwhile, the antilegalist attitude of the Community has changed. The Community has supported the conclusion of a new legalist Dispute Settlement Understanding. Whether this change in approach will have its logical consequences will depend on the Court of Justice.

### 2.2.2 The WTO Dispute Settlement Procedure

The basic framework for GATT dispute settlement was provided by Articles XXII and XXIII of the General Agreement and this has not changed.<sup>121</sup> Under Article XXII, each contracting party is required to accord sympathetic consideration to, and afford adequate opportunity for consultations regarding, representations made by another contracting party with respect to any matter affecting the operation of the Agreement. If consultations fail, the complaining party may invoke Article XXIII. This article provides that if any contracting party should consider that any benefit accruing to it under the Agreement is being nullified or impaired or that the attainment of any objective of the Agreement is being impeded as the result of the failure of another contracting party to carry out its obligation, or the application by

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of *Multilateral Trade Negotiations* 285 (2nd. updated ed. 1991).

<sup>120</sup> According to Petersmann, there have been 149 cases between 1948 and 1990. The European Community was involved in 56 cases and the United States in 86. See E.-U. Petersmann (ed.), *GATT Dispute Settlement Proceedings Under Article XXIII 1948-1990, Adjudication of International Trade Disputes in International and National Economic Law* (1992), Annex. According to Pescatore, 84 panel reports were adopted between 1949 and 1992. The European Community was involved in 26 cases and the United States in 44. See P. Pescatore, W.J. Davey and A.F. Lowenfeld, *Handbook of GATT Dispute Settlement* (1992), Index of Countries.

<sup>121</sup> But references in these provisions to 'contracting parties' shall be deemed to read 'Member' and references to the CONTRACTING PARTIES, 'Ministerial Conference'. See the Explanatory Notes to the Agreement Establishing the WTO.

another contracting party of any measure, whether or not it conflicts with the Agreement,<sup>122</sup> it may refer the matter to the CONTRACTING PARTIES. The CONTRACTING PARTIES shall promptly investigate the matter and shall make appropriate recommendations or give a ruling on the matter. If the CONTRACTING PARTIES consider that the circumstances are serious enough, they may authorize the complaining contracting party to suspend the application of such concessions or other obligations under the Agreement as they determine to be appropriate under the circumstances.<sup>123</sup>

On the basis of these two provisions the GATT dispute settlement system evolved and during the Tokyo Round an 'Understanding' on dispute settlement was negotiated which codified existing practices.<sup>124</sup> In the GATT Ministerial Declaration of 1982, the CONTRACTING PARTIES subsequently acknowledged that "the Understanding on Notification, Consultation, Surveillance and Dispute Settlement negotiated during the Tokyo Round provides the essential framework of procedures for the settlement of disputes among contracting parties, and that no major change is required in this framework, but that there is scope for more effective use of the existing mechanism and for specific improvements in procedures". This Ministerial Declaration and the action taken by the CONTRACTING PARTIES on 30 November 1984 led to such further improvements in the GATT dispute settlement procedures. In the Uruguay Round, one of the negotiating groups established was the Negotiating Group on Dispute Settlement. Its negotiating objective was as follows:

In order to ensure prompt and effective resolution of disputes to the benefit of all contracting parties, negotiations shall aim to improve and strengthen the rules and the procedures of the dispute settlement process, while recognizing the contribution that would be made by more effective and enforceable GATT rules and disciplines. Negotiations shall include the development of adequate arrangements for overseeing and monitoring of the procedures that would facilitate compliance with adopted recommendations.<sup>125</sup>

In the Mid-Term Review Agreements of April 1989, approval by the CONTRACTING

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<sup>122</sup> There is a difference between 'violation' complaints and 'non-violation' complaints. Measures not in conflict with GATT may also nullify or impair benefits accruing to a contracting party. See generally, E.-U. Petersmann, 'Violation-Complaints and Non-Violation Complaints in Public International Trade Law', 34 *Germ. Yb. Int'l L.* 175 (1991).

<sup>123</sup> Such authorization has only been granted once in the entire history of GATT. In 1953, The Netherlands was authorized to impose quantitative restrictions on the import of wheat-flour from the United States. See 'Netherlands Measures of Suspension of Obligations to the United States', BISD 1S/32.

<sup>124</sup> Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance, adopted on 28 November 1979, (L/4907), BISD 26S/210-218.

<sup>125</sup> BISD 33S/25.



PARTIES of the revisions of the dispute settlement procedures was suggested and their application on a trial basis from 1 May 1989 until the end of the Uruguay Round. The 'Improvements'<sup>126</sup> were praised by many delegations as one of the most significant concrete achievements of the Mid-Term Review Conference, which could significantly strengthen the multilateral GATT trading system.<sup>127</sup> Some of the reforms went as far as seemed possible in securing speedy panel proceedings. The Dispute Settlement Understanding (DSU)<sup>128</sup> ensuing from the Uruguay Round further elaborated the existing dispute settlement rules and procedures. Although the Improvements had already significantly enhanced these procedures, several countries had continued to show discontent with the system and had insisted on further reform.

The DSU establishes a single, uniform dispute settlement system. The rules and procedures of the DSU apply to all disputes between WTO Members brought under the consultation and dispute settlement rules of the Agreement establishing the WTO, the Agreements on Trade in Goods, the GATS, the TRIPs Agreement, the Plurilateral Trade Agreements,<sup>129</sup> and the Dispute Settlement Understanding itself.<sup>130</sup> These rules apply, however, subject to special or additional rules and procedures on dispute settlement contained in the covered agreements. Some agreements, for instance the Anti-dumping Agreement, contain rules which reflect a slightly different approach than the approach taken under the DSU.<sup>131</sup> To the extent that there is a difference between the rules of the DSU and the special or

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<sup>126</sup> Improvements to the GATT Dispute Settlement Rules and Procedures, Decision of 12 April 1989, (L/6489), BISD 36S.

<sup>127</sup> See Petersmann, *supra* note 102, at 522/523.

<sup>128</sup> Understanding on Rules and Procedures Governing the Settlement of Disputes, 15 December 1993, MTN/FA II-A2.

<sup>129</sup> The applicability of the DSU to Plurilateral Trade Agreements is however subject to the adoption of a decision by the signatories of each Agreement setting out the terms for the application of the DSU to the individual agreement, including any special or additional rules or procedures, as notified to the Dispute Settlement Body.

<sup>130</sup> Therefore to all Agreements except the Trade Policy Review Mechanism.

<sup>131</sup> For sake of uniformity these different approaches should perhaps have been reconciled, but negotiation fatigue and the fact that it seemed unlikely that the chosen solution would pose major problems in the short term were reason enough to leave this an issue for future debate. See P.T.B. Kohona, 'Dispute Resolution under the World Trade Organization: An Overview', 28 J.W.T. 23 (1994), p. 26.

additional rules of one of the covered agreements, the latter will prevail.<sup>132</sup> The rules of the DSU and, except as otherwise provided in a covered agreement, the consultation and dispute settlement provisions of the covered agreements, are administered by the Dispute Settlement Body (DSB) established under the WTO Agreement.<sup>133</sup> The DSB has the authority to establish Panels, adopt Panel and Appellate Body reports, maintain surveillance of implementation of rulings and recommendations, and authorize suspension of concessions and other obligations under the covered agreements.

Paragraph 4 DSU confirms the rule of Article XXII and provides for specific time-limits. Each WTO Member agrees to accord sympathetic consideration to and afford adequate opportunity for consultation regarding any representations made by another Member concerning measures affecting the operation of the covered agreements taken within the territory of the former. If a request for consultations is made, the Member to which the request is made must, unless otherwise mutually agreed, reply to the request within ten days and it must enter into consultations in good faith within a period of no more than thirty days. If the Member does not respond within ten days, or does not enter into consultations within thirty days, or a period otherwise mutually agreed, then the Member that requested the holding of consultations may proceed directly to request the establishment of a Panel.<sup>134</sup> If the consultations fail to solve the dispute within sixty days after the request for consultations, the complaining party may request the establishment of a Panel. The complaining party may request a Panel during the sixty-day period if the consulting parties jointly consider that

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<sup>132</sup> Paragraph 1.2 DSU provides that "in disputes involving rules and procedures under more than one covered agreement, if there is a conflict between special or additional rules and procedures of these agreements, and where the parties to the dispute cannot agree on rules and procedures within twenty days of the establishment of the panel, the Chairman of the DSB, in consultation with the parties to the dispute, shall determine the rules and procedures to be followed within ten days after a request by either Member". Pescatore has criticized this provision, In his view, the solution of legal conflicts is a matter for the body which has to decide the substance of the case (therefore, the panel). See P. Pescatore, 'The GATT Dispute Settlement Mechanism: Its Present Situation and Its Prospects', 27 J.W.T. 5 (1993), pp. 18/19.

<sup>133</sup> The Dispute Settlement Body is the General Council of the WTO *convening as* Dispute Settlement Body. See Article IV:3 WTO: "The General Council shall convene as appropriate to discharge the responsibilities of the Dispute Settlement Body provided for in the Understanding on Rules and Procedures Governing the Settlement of Disputes ...".

<sup>134</sup> All requests for consultations must be notified to the DSB and the relevant Councils and Committees by the Member which requests consultations. Any request for consultations shall be submitted in writing and shall give the reasons for the request, including identification of the measures at issue and an indication of the legal basis for the complaint; paragraph 4.4 DSU.

consultations have failed to settle the dispute.<sup>135</sup> A Member with a substantial trade interest in consultations being held between other Members, may notify the consulting Members and the DSB, within ten days of the circulation of the request for consultations, of its wish to join the consultations, provided that the Member to which the request for consultations was addressed agrees that the claim of substantial interest is well-founded.<sup>136</sup> The texts of paragraph 4 and 6 respectively, do not explicitly require that consultations are held before a request for the establishment of a Panel can be made.<sup>137</sup> However, since the DSU adheres to the established principles of dispute settlement under Articles XXII and XXIII of the GATT 1947,<sup>138</sup> it must be assumed that consultations shall precede the Panel procedure.

Members may agree to settle their dispute through good offices, conciliation or mediation. These procedures are voluntary and without prejudice to the rights of either party in any further proceedings under the DSU.<sup>139</sup> Good offices, conciliation or mediation may be offered by the Director-General, acting in an *ex officio* capacity. When good offices, conciliation or mediation are entered into within sixty days of a request for consultations, the complaining party must allow a period of sixty days from the date of the request for consultations before he may request the establishment of a Panel. The complaining party may request a Panel during the sixty days if the parties to the dispute jointly consider that the good offices, conciliation or mediation process has failed to resolve the dispute. The sporadic use of good offices and conciliation procedures in the past, seems to indicate that parties to a dispute usually prefer to seek legal rulings concerning their rights.<sup>140</sup>

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<sup>135</sup> In cases of urgency, including those which concern perishable goods, consultations must be entered into within a period of no more than ten days. If the consultations have failed to settle the dispute within a period of twenty days after the request, the complaining party may request the establishment of a panel; paragraph 4.8 DSU.

<sup>136</sup> If the request to be joined in the consultations is not accepted, the applicant Member is free to request consultations; paragraph 4.11 DSU.

<sup>137</sup> Some evidence to the contrary can be found in paragraphs 4.3 and 6.2. Paragraph 4.3 states that: "If a request for consultations is made ... (the Member shall reply); paragraph 6.2. declares that the request for a Panel shall indicate, inter alia, *whether* consultations were held.

<sup>138</sup> Paragraph 3.1 DSU.

<sup>139</sup> Under the Understanding regarding Notification, Consultation, Dispute Settlement and Surveillance of 1979, conciliation was mandatory after consultations had failed.

<sup>140</sup> See E.-U. Petersmann, 'The GATT Dispute Settlement System and the Uruguay Negotiations on its Reform', in: P. Sarcevic and H. van Houtte (eds.), *Legal Issues in International Trade* 53 (1990), p. 73.

A Panel is established, at the request of the complaining party, at the latest at the DSB meeting following that at which the request first appears as an item on the DSB agenda,<sup>141</sup> unless at that meeting the DSB decides by consensus not to establish a Panel.<sup>142</sup> The right to a Panel was already laid down in the Improvements.<sup>143</sup> Before the Improvements this right was controversial and contracting parties often tried to frustrate the dispute settlement procedure by opposing the establishment of a Panel in the Council. Panels are composed of governmental and/or non-governmental individuals, selected with a view to ensuring the independence of the panelists.<sup>144</sup> Panels are composed of three panelists unless the parties to the dispute agree, within ten days establishment, to a Panel composed of five panelists.<sup>145</sup> When more than one Member requests the establishment of a Panel related to the same matter, a single Panel should be established whenever feasible.<sup>146</sup> A Member with a substantial interest in the matter has the opportunity to be heard by the Panel and to make written submissions to it.<sup>147</sup>

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<sup>141</sup> If the complaining party so requests, a meeting of the Dispute Settlement Body shall be convened for this purpose within fifteen days of the request, provided that at least ten days advance notice of the meeting is given; note to paragraph 6.1 DSU.

<sup>142</sup> Paragraph 6.2 DSU provides that the request for the establishment of a Panel must, *inter alia*, identify the specific measures at issue and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly. Under paragraph 7, Panels shall have standard terms of reference unless the parties agree on other terms of reference within twenty days from the establishment of the Panel. The standard terms of reference are: "To examine, in the light of the relevant provisions in (name of the covered agreement/s), the matter referred to the DSB by (name of the complaining party) in document DS/... and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in that/those agreement/s".

<sup>143</sup> See paragraph F(a) of the Improvements.

<sup>144</sup> Panelists may be representatives of Members with experience in GATT matters or experts in the area of international trade law. To assist in the selection of panelists, the Secretariat maintains an indicative list of governmental and non-governmental individuals possessing the necessary qualifications; paragraph 8.1-8.4 DSU.

<sup>145</sup> Paragraph 8.6 provides that the Secretariat shall propose the nominations for the Panel to the dispute and that the parties may not oppose nominations except for compelling reasons. Under paragraph 8.7, the Director-General in consultation with the Chairman of the DSB, and the Chairman of the relevant Council or Committee, shall form the Panel, at the request of either party and no later than ten days from the date of the request, if no agreement can be reached on the panelists within twenty days from the establishment of a Panel. The fact that panelists are appointed by the Secretariat gives them a clear sense of independence and authority. See Pescatore, *supra* note 132, at 9.

<sup>146</sup> Paragraph 9.1 DSU.

<sup>147</sup> Paragraph 10.2 DSU.

Paragraph 12 guarantees a speedy procedure by prescribing specific deadlines for written submissions by the parties and for the submission of the report by the panelists. After consulting the parties to the dispute, the panelists must, as soon as practicable and whenever possible within one week after the composition and terms of reference of the Panel have been agreed upon, fix the timetable for the Panel procedure. Panels should set precise deadlines for written submissions by the parties and the parties should respect those deadlines. Usually, there will be two rounds of written submissions and two oral hearings.<sup>148</sup> After each hearing the Panel remains in deliberation. Its deliberations take place in secrecy.<sup>149</sup> According to Pescatore, this gradual method is more efficient than the formal way of court deliberations.<sup>150</sup> The period in which the panelists examine the dispute, from the time the composition and terms of reference of the Panel have been agreed upon to the time when the final report is provided to the parties to the dispute, may not, as a general rule, exceed six months.<sup>151</sup> A final report will usually contain an introduction describing the origin of the dispute and the procedure which was followed, a description of the facts, a summary of the arguments of the parties, the Panel's findings (i.e. the basic rationale behind any findings) and, finally, its recommendations.<sup>152</sup> The adoption of Panel reports has been facilitated considerably. Within sixty days of the issuance of a Panel report to the Members, the report shall be adopted at a DSB meeting<sup>153</sup> unless one of the parties to the dispute formally notifies the DSB of its decision to appeal or the DSB decides by consensus not to adopt the report. If a party has notified its intention to appeal, the report by the panel shall not be considered for adoption by the DSB until after completion of the appeal. The automatic adoption of panel reports, only to be blocked by consensus, is probably the most significant

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<sup>148</sup> See the Working Procedures appended to the DSU.

<sup>149</sup> Paragraph 14.1 DSU.

<sup>150</sup> See Pescatore, *supra* note 132, at 11: "... this gradual approach is the superiority of the GATT panel procedure in comparison with traditional court proceedings".

<sup>151</sup> In cases of urgency, including those relating to perishable goods, the Panel shall aim to provide its report to the parties to the dispute within three months. When the Panel cannot provide its report within six months, or within three months in cases of urgency, it must inform the DSB of the reasons for the delay and give an estimate of the period within which it will submit its report. In no case should the period from the establishment of the Panel to the submission of the report to the Members exceed nine months. See paragraphs 12.8 and 12.9.

<sup>152</sup> See Pescatore, *supra* note 132, at 12/13 and paragraph 12.7 DSU.

<sup>153</sup> If a meeting of the DSB is not scheduled within this period, a meeting of the DSB shall be held for this purpose.

improvement of the dispute settlement system and justifies the designation of the current procedure as a quasi-judicial one.<sup>154</sup>

The DSU introduces a standing Appellate Body composed of seven members, three of whom serve on any one case. They are appointed for a four-year term and each member may be reappointed once. The Appellate Body is comprised of persons of recognized authority, with demonstrated expertise in law, international trade and the subject matter of the covered agreements generally. The Appellate Body membership must be broadly representative of membership in the WTO. Only parties to the dispute, not third parties, may appeal a Panel decision.<sup>155</sup> An appeal must be limited to issues of law covered in the Panel report and legal interpretation developed by the Panel. Some difficulties might arise in determining what constitutes an issue of fact and what an issue of law, as civil law and common law approaches differ on this point.<sup>156</sup> As a general rule, the proceedings may not exceed sixty days.<sup>157</sup> The Appellate Body may uphold, modify or reverse the legal findings and conclusions of the Panel. An appellate report shall be adopted by the DSB and unconditionally accepted by the parties to the dispute, unless the DSB decides by consensus not to adopt the appellate report. The Appellate Review is another new feature of the dispute settlement procedure and another true example of the more legalistic approach to dispute resolution.

Within thirty days of the adoption of the panel or Appellate Body report a DSB meeting will be held, where the Member concerned must inform the DSB of its intentions in respect of implementation of the recommendations of the DSB.<sup>158</sup> If it is impracticable to comply immediately with the recommendations, the Member is allowed a reasonable period of time

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<sup>154</sup> Under paragraph G.3 of the 1989 Improvements a panel report still had to be adopted by consensus, in the sense that each contracting party could block adoption.

<sup>155</sup> Third parties which have notified the DSB of a substantial interest in the matter may make written submissions to, and be given an opportunity to be heard by, the Appellate Body; paragraph 17.4 DSU.

<sup>156</sup> See also Kohona, *supra* note 131, at 40.

<sup>157</sup> When the Appellate Body cannot provide its report within sixty days, it must inform the DSB in writing of the reasons for the delay together with an estimate of the period within which it will submit its report. The proceedings may, in no case, exceed ninety days; paragraph 17.5 DSU. Proceedings of the Appellate Body are confidential; paragraph 17.10 DSU.

<sup>158</sup> Paragraph 21.3 DSU.

in which to do so.<sup>159</sup> The implementation of adopted recommendations is kept under surveillance by the DSB. The issue of implementation may be raised at the DSB by any Member at any time following their adoption and, unless the DSB decides otherwise, this issue shall be on the agenda of the DSB meeting after six months following the establishment of the reasonable period of time and shall remain on the agenda until the matter is resolved.<sup>160</sup> Paragraph 22 provides for compensation and the suspension of concessions or other obligations in case recommendations are not implemented. A Member who does not comply with the recommendations within the determined reasonable period of time is, on request, required to enter into negotiations with the complaining party with a view to developing mutually acceptable compensation. If no satisfactory compensation has been agreed within twenty days after the expiry of the reasonable period of time, the complaining party may request authorization from the DSB to suspend the application to the Member concerned of concessions or other obligations under the covered agreements. The DSB shall grant this authorization to suspend concessions or other obligations within thirty days of the expiry of the reasonable period of time, unless the DSB decides by consensus to reject the request.<sup>161</sup> In determining what concessions or other obligations to suspend, the complaining party must follow a specific procedure. It does not have an unlimited right to retaliate. First the complaining party should seek to suspend concessions or other obligations with respect to the same sector(s) as that in which the panel or Appellate Body has found a violation or other nullification or impairment. If that party considers that it is not practicable or effective to suspend concessions or other obligations with respect to the same sector(s), it may seek to suspend concessions or other obligations in other sectors under the same agreement. If it considers that this is not practicable or effective either, and that the circumstances are serious enough, it may seek to suspend concessions or other obligations under another covered agreement.<sup>162</sup> The level of the suspension of concessions or other

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<sup>159</sup> Under paragraph 21.3, a reasonable period of time is considered to be: a) the period of time proposed by the Member concerned, provided that such period is approved by the DSB; or, in the absence of such approval, b) a period of time mutually agreed by the parties to the dispute within 45 days following adoption of the recommendations; or, in the absence of such agreement, c) a period of time determined through binding arbitration within 90 days following adoption of the recommendations.

<sup>160</sup> Paragraph 21.6 DSU.

<sup>161</sup> The DSB shall not authorize suspension of concessions or other obligations if a covered agreement prohibits such suspension; paragraph 22.5 DSU.

<sup>162</sup> Paragraph 22.3 DSU.

obligations must be equivalent to the level of the nullification or impairment.<sup>163</sup> If the Member concerned objects to the level of suspension proposed, or claims that suspension should not have been granted in another sector under the same agreement or under another covered agreement, the matter shall be referred to arbitration.<sup>164</sup> The suspension of concessions or other obligations are temporary and may only be applied until the inconsistent measure has been removed.<sup>165</sup> The Members emphasize, in paragraph 23 of the DSU, the fact that they consider WTO dispute settlement a multilateral effort. When Members seek the redress of a violation of obligations or other nullification or impairment of benefits under the covered agreements, they shall have recourse to, and abide by, the rules and procedures of the DSU.<sup>166</sup> They may not make unilateral determinations that a violation has occurred, as the United States has done in the past on the basis of its infamous Section 301.

Even before the DSU, the GATT dispute settlement procedure already had proven to be one of the most effective dispute settlement systems existing in any international organization.<sup>167</sup> The problems of the past usually have been caused by conflicts over substantive GATT provisions, rather than by deficiencies in the dispute settlement procedure.<sup>168</sup> GATT panel proceedings always have been by far the quickest international procedure for the settlement of disputes among States. They have been notably quicker on

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<sup>163</sup> Paragraph 22.4 DSU.

<sup>164</sup> Such arbitration shall be carried out by the original Panel, if members are available, or by an arbitrator or arbitrators appointed by the Director-General and shall be completed within sixty days of the expiry of the reasonable period of time. Concessions or other obligations shall not be suspended during the course of the arbitration. The parties shall must the arbitrator's decision as final and the parties concerned may not seek a second arbitration. The DSB shall be informed promptly of the decision of the arbitrator and shall, upon request, grant authorization to suspend concessions or other obligations where the request is consistent with the decision of the arbitrator unless the DSB decides by consensus to reject the request; paragraph 22.6 and 22.7 DSU.

<sup>165</sup> Or the Member that must implement the recommendations provides a solution to the nullification or impairments of benefits, or a mutually satisfactory solution is reached; paragraph 22.8 DSU.

<sup>166</sup> This paragraph in particular is reinforced by the provision of Article XVI.4 WTO which provides that: "Each Member shall ensure the conformity of its laws, regulations and administrative procedures with its obligations as provided in the annexed Agreements".

<sup>167</sup> Brand, for example, notes that "it is easy to lose sight of the fact that GATT dispute settlement represents perhaps the most successful effort in history at peaceful and effective dispute resolution among nations". See Brand, *supra* note 118, at 118.

<sup>168</sup> See E.-U. Petersmann, 'Strengthening GATT Procedures for Settling Trade Disputes', 11 *The World Economy* 55, (1988), pp. 67 and 69.



average than, for example, the proceedings of the European Court of Justice and the International Court of Justice, or arbitration proceedings of the International Chamber of Commerce.<sup>169</sup> The DSU further enhances the already well-equipped procedure. Although the DSU does not allow for recourse to an international judicial body, it comes very close to a judicial procedure. No longer can it be maintained that GATT involves rules which are only enforced by way of diplomatic negotiations. The dispute settlement system matured and now resembles a judicial system. Only from a purely formal point of view, the dispute settlement system is a non-judicial one; the decision on adoption of the report still is taken by a political body. The 'losing' party, however, can no longer block adoption. Adoption has become a mere formality. Under the new regime, the law clearly prevails.<sup>170</sup> In fact, the WTO Members explicitly declare that they consider the dispute settlement system of the WTO a central element in providing security and predictability to the world trading system.<sup>171</sup> It is only the legalist model which can bring such security and predictability to international economic relations.

This being said, it must be admitted that diplomatic considerations are not completely strange to the DSU. According to paragraph 3.7, the aim of the dispute settlement procedure is to secure a positive solution to a dispute and a solution mutually acceptable to the parties is to be preferred. Paragraph 3.4 provides that recommendations of the DSB shall be aimed at achieving a satisfactory settlement of the matter. It is clear, however, that all these mutually acceptable solutions and all recommendations must be in accordance with the rights and obligations under the covered agreements.<sup>172</sup> Paragraph 3.2 stipulates that DSB recommendations cannot add to or diminish these rights and obligations of the Members.<sup>173</sup> Judicial activism by panels and the Appellate Body is not appreciated. Since the rights and obligations of the parties have been carefully balanced in negotiations, they can be modified

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<sup>169</sup> See Petersmann, *supra* note 102, at 524.

<sup>170</sup> On the 'progressive legalization' of the dispute settlement procedure see E.-U. Petersmann, 'The Dispute Settlement System of the World Trade Organization and the Evolution of the GATT Dispute Settlement System Since 1948', 31 C.M.L. Rev. 1157 (1994), pp. 1187ff. See also P. Hallström, *The GATT Panels and the Formation of International Trade Law* (1994), pp. 194/195.

<sup>171</sup> Paragraph 3.2 DSU.

<sup>172</sup> See paragraphs 3.4 and 3.7 DSU.

<sup>173</sup> This provision was introduced by the 1982 Ministerial Declaration.

only through negotiations and not through judicial interpretation.<sup>174</sup> But it is also recognized that the WTO dispute settlement procedure serves to clarify the existing provisions in accordance with customary rules of interpretation of public international law. This seems to allow for the teleological method.<sup>175</sup> In any event, Members indisputably have the right to seek authoritative interpretation of provisions of covered agreements through decision-making under the WTO Agreement.<sup>176</sup> The mixture of law and diplomacy in the DSU can easily be explained. A major obstacle to the understanding of litigation between governments has always been the inclination of an outside observer to treat international judicial institutions as if they were the same as domestic judicial institutions.<sup>177</sup> Governments, however, are not private litigants. The rationality of their behaviour is the rationality of bureaucracies, of political coalitions and democratic electorates.<sup>178</sup> The fact that dispute settlement procedures, in such a vital area as international trade, cannot primarily aim for clear-cut judicial decisions is perfectly understandable.

Since World War II governments have, on many occasions, expressed their preference for a more legalist approach to GATT dispute resolution. For a long time, the European Community has been opposed to such approach but its attitude has changed. In the Uruguay Round not only the dispute settlement procedure but the entire 'constitutional' structure of GATT was improved, rules were sharpened and a firm commitment to legalism was made. Through the work of the Panels and the Appellate Body GATT law will develop into a more coherent system of principles and rules.<sup>179</sup> A consistent body of GATT jurisprudence will evolve and this may eventually persuade the European Court of Justice to grant direct effect to clear and unconditional GATT provisions as well as to the findings of GATT Panels.<sup>180</sup>

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<sup>174</sup> See also paragraph A.2 of the 1989 Improvements.

<sup>175</sup> Paragraph 3.2 DSU.

<sup>176</sup> Paragraph 3.9 DSU.

<sup>177</sup> See R.E. Hudec, "'Transcending the Ostensible:' Some Reflections on the Nature of Litigation Between Governments', 72 Minn. L. Rev. 211 (1987), p. 212.

<sup>178</sup> *Ibid.*

<sup>179</sup> See also K.J. Kuilwijk, 'Book Review' of: P. Hallström, *The GATT Panels and the Formation of International Trade Law* (1994), 32 C.M.L.Rev. (1995).

<sup>180</sup> See also the deliberations of Pescatore in this respect, *supra* note 132, at 16. See also Bourgeois, *supra* note 90, at 20.

## *E. Additional Arguments against Direct Effect of GATT*

### 1. National Case-Law

In *Third International Fruit Company*, Advocate-General Mayras argued that the GATT case-law of Italian courts was irrelevant to the issue of direct effect in Community law. The Advocate-General played down the case-law of the Italian Corte di Cassazione, which had recognized the direct effect of Article III of GATT in a series of decisions.<sup>181</sup> These judgments, the Advocate-General argued, are based on the dualist conception of the relationship between international and domestic law. The Italian municipal law which was adopted for the implementation of GATT, expressly incorporated the rules of GATT into national law. Since in this system a subsequent law contrary to Article III would deprive individuals of the possibility of forcing the State to observe it, the Advocate-General concluded, it is not a question of direct effect within the meaning of the case-law of the Court of Justice.<sup>182</sup> Kapteyn has countered, however, that the question of the clarity and precision of a provision remains relevant even if the provision cannot be applied directly but only by virtue of prior transformation into domestic law.<sup>183</sup> And also to Riesenfeld it is clear that "the problem of self-executing or non-self-executing nature of treaties also arises in countries where advice and consent to ratification must be given in the form of a statute passed by the whole legislature in the ordinary course".<sup>184</sup> To which Italian case-law did Advocate-General Mayras refer?

In 1968, the Italian Court of Cassation upheld a judgment of the Milan Court of Appeals in which the latter had granted direct effect to Article III:2 of GATT and had ordered the Italian State to reimburse to importers of raw cotton, taxes levied on this product in excess to those

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<sup>181</sup> See G. Sacerdoti, 'Application of GATT by Domestic Courts: European and Italian Case Law', *Italian Yb. Int'l L.* 224 (1976). See also C. Mastellone, 'Annotation Case 266/81, Joined Cases 267-269/81', 20 *C.M.L.Rev.* 559 (1983).

<sup>182</sup> [1972] *E.C.R.* 1219, at 1238.

<sup>183</sup> See P.J.G. Kapteyn, 'The Domestic Law Effect of Rules of International Law within the European Community System of Law and the Question of the Self-Executing Character of GATT Rules', *Int'l Law.* 74 (1974), pp. 77/78.

<sup>184</sup> See S.A. Riesenfeld, 'The Doctrine of Self-executing Treaties and GATT: A Notable German Judgment', 65 *A.J.I.L.* 548 (1971), p. 549.

levied on similar national goods.<sup>185</sup> The direct effect of Article III was confirmed in later judgments of the Court of Cassation, for example in the *Banco Cattolica del Veneto Case*<sup>186</sup> in which the court ruled that: "the GATT clause on equality of taxation has been incorporated in the national legal system as a rule having effects on intersubjective relationships and thus confers rights which may be protected before the courts".<sup>187</sup> Mastellone notes that the subsequent case-law of the Court of Cassation during the 1970s displayed two important points of interest. First, the Court further developed the concept of direct effect of GATT provisions arguing that individual provisions may be regarded directly effective solely on the basis of their particular content and regardless of the spirit, nature and general scheme of the whole Agreement. Second, independent from the question of direct effect, GATT was employed as a means of interpreting domestic (fiscal) legislation. According to Mastellone, the Court has attached more importance to this second point.<sup>188</sup> It cannot be denied, however, that the Court of Cassation was willing, unlike the European Court of Justice, to take the direct effect hurdle before turning to matters of interpretation.<sup>189</sup> Meanwhile, the Court of Cassation has conformed to the case-law of the Court of Justice. It had to reconsider its own case-law in the light of, in particular, the *Nederlandse Spoorwegen* judgment, in which the Court held that:

... since so far as fulfilment of the commitments provided for by GATT is concerned, the Community has replaced the Member States, the mandatory effect, in law, of these commitments must be determined by reference to the relevant provisions in the Community legal system and not to those which gave them their previous force under the national legal systems.<sup>190</sup>

In *SIOT* and *SPI/SAMI*, the Court of Cassation therefore humbly asked the Court of Justice whether "the national court [was] obliged to take the view, having regard to the attribution

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<sup>185</sup> See Judgment No. 2293, 6 July 1968, *Ministero delle Finanze v. Cotonificio Valle Ticino*, *Foro Italiano* 1968, I, 2462. See Mastellone, *supra* note 181, at 568/569.

<sup>186</sup> Judgment No. 3923, 28 October 1976, *Banca Cattolica del Veneto v. Ministero delle Finanze*, *Foro Italiano* 1977, I, 1231.

<sup>187</sup> Quoted from Mastellone, *supra* note 181, at 569.

<sup>188</sup> See Mastellone, *supra* note 181, at 570-574.

<sup>189</sup> Steenbergen has further pointed to a decision by the President of the Tribunale di Milano of 2 April 1980 in a case involving European producers of synthetic fibers and Italian-based American importers (importing from the United States). This tribunal considered Articles III, V, VI, XIII, XVI and XX to be directly effective. Apparently, the European Commission publicly disapproved of the decision as being incompatible with Community law. See J. Steenbergen, 'The Status of GATT in Community Law', 15 *J.W.T.L.* 337 (1981), pp. 341-343.

<sup>190</sup> [1975] E.C.R. 1439, at 1450 (paragraph 16).

of jurisdiction under Article 177 of the EEC Treaty, that GATT, ..., operates at the level of a mere international obligation and has no direct effect internally, or else that it does have such effect with regard to relations between parties, and, if the latter is the case, has GATT the same status as, or greater status than, the conflicting national provisions?"<sup>191</sup> In Germany, the Tax Court of Hamburg held, by judgment of 29 October 1969, that GATT Article III could not be regarded directly effective.<sup>192</sup> In the court's opinion, the contracting parties could not have intended direct effect of GATT *in toto* in view of its nature as a worldwide agreement on commercial policies.<sup>193</sup>

## 2. Provisional Application

In *Third International Fruit Company*, Advocate-General Mayras argued that GATT's application on a provisional basis provided an argument against recognition of direct effect.<sup>194</sup> GATT never has been approved by the national parliaments of the Member States, or promulgated in their law gazettes. Furthermore, the reservation for existing domestic law incompatible with GATT obligations does not fulfil the requirements for its direct effect. It is certainly true that GATT 1947 always has been applied on a provisional basis.<sup>195</sup> It was applied by the original contracting parties on the basis of the Protocol of Provisional Application of 30 October 1947 and by subsequently acceding parties on the basis of their individual (provisional) accession protocols. As explained previously, GATT is no longer applied on a provisional basis. However, arguments such as put forward by Advocate-General Mayras never have carried much weight. Under Article 25 of the Vienna Convention on the Law of Treaties, provisional application of treaties is not inferior to final application. Therefore, the protocols were binding agreements under international law and definitive

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<sup>191</sup> [1983] E.C.R. 731, at 774. [1983] E.C.R. 801, at 826/827.

<sup>192</sup> Judgment of 29 October 1969 (IVa 353/66), 16 Aussenwirtschaftsdienst des Betriebs-Beraters 93 (1970). See Riesenfeld, *supra* note 183, at 548.

<sup>193</sup> See Riesenfeld, *supra* note 183, at 548/549.

<sup>194</sup> [1972] E.C.R. 1219, at 1239.

<sup>195</sup> On the provisional application of the GATT *see, e.g.*, M. Hansen and E. Vermulst, 'The GATT Protocol of Provisional Application: A Dying Grandfather?' 27 Colum. J. Transnat'l L. 263 (1989).

acceptance did not in itself alter the status of GATT law in the domestic legal systems.<sup>196</sup> Furthermore, the so-called 'grandfather clause' already had largely lost its practical importance since most GATT contracting parties had in the meantime repealed their inconsistent preexisting mandatory legislation due to, *inter alia*, the implementation of the various trade agreements concluded in the Tokyo Round. In the European Community, in particular, Community law gradually superseded and replaced the national trade legislation of its Member States.<sup>197</sup>

### F. Conclusion

The Court's direct effect doctrine is one of its most seriously criticized. In the commentators' various analyses, the legal, political as well as economic rationale behind its judgments have come under attack. It appears that a majority of commentators would have preferred a more liberal approach by the European Court. In a comment on the *Third International Fruit Company* Case, Schermers argued that it would seem obvious that in case the Community is bound by a rule of international law, it has lost its power to make conflicting rules. Such inconsistent rules therefore should be void.<sup>198</sup> In addressing the issue of direct effect of Community law the Court of Justice largely has followed the legal approach Schermers advocates. In one of his articles, Pierre Pescatore describes this philosophy of the Court.<sup>199</sup> By their very nature, he argues, legal rules have a practical purpose: any legal rule is devised to operate effectively. If it is not operative, it is simply not a rule of law. Therefore, the task of lawyers is to help put legal rules into operation, not to impede their effects. Direct effect,

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<sup>196</sup> See E.-U. Petersmann, 'Strengthening the Domestic Legal Framework of the GATT Multilateral Trade System: Possibilities and Problems of Making GATT Rules Effective in Domestic Legal Systems', in: E.-U. Petersmann and M. Hilf (eds.), *The New GATT Round of Multilateral Trade Negotiations* 33 (2nd. updated ed. 1991), pp. 100/101. See also M. Hilf, 'The Application of GATT within the Member States of the European Community, with Special Reference to the Federal Republic of Germany', in: M. Hilf, F.G. Jacobs and E.-U. Petersmann, *The European Community and GATT* 153 (1986), pp. 175/176. Pescatore, however, has argued that the internal effect of GATT was affected by this provisional application, but gives no further explanation of this 'dissenting opinion'. See P. Pescatore, 'Conclusion', to: F.G. Jacobs and S. Roberts (eds.), *The Effect of Treaties in Domestic Law* (1987), p. 277.

<sup>197</sup> See Petersmann, *supra* note 70, at 431. See also Hilf, *supra* note 196, at 176.

<sup>198</sup> See H.G. Schermers, 'Community Law and International Law', 12 C.M.L.Rev. 77 (1975), p. 80.

<sup>199</sup> See P. Pescatore, 'The Doctrine of "Direct Effect:" An Infant Disease of Community Law', 8 E.L.Rev. 153 (1983).

which only means "practical operation for all concerned", must be considered the normal condition of any rule of law. Since the non-operation of a rule of law is not a normal phenomenon, but an antinomy in a legal system, direct effect must be presumed and does not have to be established *a priori*.<sup>200</sup> Examining the Court's case-law on this issue, Pescatore finds that the two criteria the Court employs to determine whether a Community rule can have direct effect, namely that the rule must be unconditional and must also have a sufficient degree of precision, boil down to a question of justiciability, that is, a rule of law can have direct effect whenever "it is capable of judicial adjudication, account being taken both of its legal characteristics and of the ascertainment of the facts on which the application of each particular rule has to rely".<sup>201</sup> In the last analysis, he concludes, direct effect of Community rules "depends less on the intrinsic qualities of the rules concerned than on the possumus or non possumus of the judges".<sup>202</sup>

Pescatore's analysis shows that it is the main concern of the Court of Justice to ensure in all circumstances the operative character of the rules of Community law. More than once, Pescatore notes, the Court has stretched the operability of Community rules, and has detected elements of effectiveness even within provisions which seemed either too vague or implied too wide a margin of discretion.<sup>203</sup> Petersmann has argued that Pescatore's view should be extended to those rules of international law that form an integral part of Community law. In other words, not just those rules of Community law proper must be presumed to have direct effect, but also international legal rules if they are capable of judicial adjudication:

... as soon as international law becomes binding on the EEC it is also binding on the institutions of the Community and on Member States (Article 228, par. 2) within the EEC and must be presumed to have direct effects also for the private subjects of the Community legal system unless the international law rules are not sufficiently precise and unconditional enough to confer rights on individuals or their direct enforceability by private individuals has been validly excluded.<sup>204</sup>

Pescatore seems to lean toward this opinion when he again emphasizes that the purpose of any legal rule is to realize some practical objective, and one should therefore never

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<sup>200</sup> See Pescatore, *supra* note 199, at 155.

<sup>201</sup> See Pescatore, *supra* note 199, at 176/177.

<sup>202</sup> See Pescatore, *supra* note 199, at 177.

<sup>203</sup> *Ibid.*

<sup>204</sup> See E.-U. Petersmann, 'International and European Foreign Trade Law: GATT Dispute Settlement Proceedings Against the EEC', 22 C.M.L.Rev. 441 (1985), p. 457 (note 31).

manipulate it in such a way as to render it meaningless.<sup>205</sup> Since effectiveness is "the very soul of legal rules", any legal rule must be presumed to be operative in view of its object and purpose. Direct effect is "the ordinary state of the law".<sup>206</sup> A few years later, he appears to confirm this assumption when he argues that if in judicial litigation a party refers to an international treaty, his argument should not be rejected *a priori* because it is taken from an international treaty, but that judges should "rather look into it to see whether it can help to find a reasonable and just solution to the contentious problem raised".<sup>207</sup> Moreover, from a pure technical point of view, it could be argued that the question of the direct effect of international agreements never should be assessed on the level of international agreements in their entirety, but always on the level of the individual provisions. International agreements of some importance are always complex and often contain a mixture of objectives and principles. Therefore, the denial of direct effect of an entire treaty leads to inadequate solutions. According to Article 31 of the Vienna Convention on the Law of Treaties, a treaty "shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of the object and the purpose". This means that a judge should start from the text of the relevant provision and then reassess the text in the light of the context, object, and purpose of the agreement as a whole and not vice versa. If a provision of an international agreement is justiciable - if it can be adjudicated in court without the need for further determination by a political authority - judges should apply and interpret the clause. Preconceived ideas about international agreements "are of little help and may lead astray".<sup>208</sup>

The fact that Community law is presumed to have direct effect within the legal spheres of the Member States has undeniably contributed to its effective application. In the *Van Gend & Loos* Case, the Court held that "the vigilance of individuals concerned to protect their rights amounts to an effective supervision in addition to the supervision entrusted by Articles 169 and 170 to the diligence of the Commission and of the Member States". Unfortunately, not much is to be expected from the diligence of the Commission in case of GATT violations.

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<sup>205</sup> See Pescatore, *supra* note 199, at 177.

<sup>206</sup> *Ibid.*

<sup>207</sup> See P. Pescatore, 'Treaty-making by the European Communities', in: F.G. Jacobs and S. Roberts, *The Effect of Treaties in Domestic Law* 171 (1987), p. 192.

<sup>208</sup> *Ibid.*



Although the Commission has initiated many infringement proceedings against Member States for violations of Community law proper, it never has sought recourse to the Court of Justice for review of trade restrictions taken by Member States in breach of GATT provisions and it is not likely that they ever will. A striking example is given by Maresceau.<sup>209</sup> In October 1982, France introduced the 'Poitiers measures': all customs clearance formalities concerning imports of VCRs into France had to be fulfilled in Poitiers. As Poitiers happens to be a town in the middle of France, importation was deliberately made burdensome. The reasoning behind the measures was the fact that France wanted to limit the imports of Japanese VCRs, although no differentiation was made as to the origin of the VCRs. The Commission replied immediately and instituted proceedings under Article 169 for infringement of Article 30 EC - creation of barriers to intra-Community trade - but it did not find it necessary to examine to what extent the Poitiers measures were violating GATT law. France agreed to no longer apply the measures to imports of VCRs originating in other Member States, but continued to apply them to VCRs from Japan. The Poitiers measures were only withdrawn after a Voluntary Restraint Agreement (VRA) had been negotiated with Japan by the Community in February 1983. It seems that the Commission accepted the slowing-down of the infringement proceeding as soon as France appeared willing to exempt the import of VCRs made in other Member States from the application of the measures.<sup>210</sup>

Ehlermann has acknowledged the fact that the Commission is unwilling to initiate Article 169 proceedings against Member States for violation of GATT, for the simple reason that the Commission "dislikes the idea of using specifically Community provisions to do non-member countries' business for them", and has admitted that when the Commission does take notice of infringements of international agreements in the external relations sphere, it is merely concerned with failure to obey the division of powers within the Community, and not with violations of the rights of third countries, parties to GATT.<sup>211</sup> However, compliance with GATT law is not non-member countries' business, but the business of European traders, consumers and taxpayers. If it becomes clear that the Commission is not willing to protect the interests of these groups in society, the Court of Justice should increase its level of judicial

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<sup>209</sup> See M. Maresceau, 'The GATT in the Case-Law of the European Court of Justice', in: M. Hilf, F.G. Jacobs and E.-U. Petersmann (eds.), *The European Community and GATT* 107 (1986).

<sup>210</sup> See Maresceau, *supra* note 209, at 112/113.

<sup>211</sup> See C.-D. Ehlermann, 'Application of GATT Rules in the European Community', in: M. Hilf, F.G. Jacobs and E.-U. Petersmann (eds.), *The European Community and GATT* 127 (1986), p. 139.

protection. The Court, however, has deemed it necessary to take a restrictive and conservative approach and has refused to grant direct effect to GATT. Its refusal cannot be justified from a legal point of view. It is a policy choice which tries to strike a balance between the different interests involved.<sup>212</sup> In the view of the Court, the political institutions should enjoy a very wide margin of discretion in this particular area of EC law in order to properly safeguard the Community public interest. Meanwhile, the Commission even has proposed to explicitly exclude the direct effect of the WTO Agreement and its Annexes. In its proposal concerning the implementation of the Uruguay Round results, the Commission declares:

It is important for the WTO Agreement and its annexes not to have a direct effect, that is one whereby private individuals who are natural or legal persons could invoke it under national law. It is already known that the United States and many of our trading will explicitly rule out any such direct effect. Without an express stipulation of such exclusion in the Community instrument of adoption, a major imbalance would arise in the actual management of the obligations of the Community and other countries.<sup>213</sup>

In its Decision of 22 December 1994, whereby the Council approved the conclusion of the WTO Agreement and its Annexes, the Council endorsed the Commission proposal and indeed has excluded the direct effect of all WTO agreements.<sup>214</sup>

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<sup>212</sup> Cf. J.H.J. Bourgeois, 'Les relations extérieures de la Communauté européenne et la règle de droit: quelques réflexions', in: F. Capotorti et al., *Du droit international au droit de l'intégration*, Liber Amicorum Pierre Pescatore 59 (1987), p. 65.

<sup>213</sup> COM (94) 414 final.

<sup>214</sup> See the final recital of Council Decision 94/800/EC, OJ L336 (22 December 1994).



## V

### *The Supremacy of GATT*

#### *A. Introduction*

THE question of the supremacy of international agreements in Community law has two different aspects. First, do international agreements binding the Community have precedence over conflicting Community law proper, such as the Treaty, regulations, directives and decisions? Second, do international commitments of the Community have priority over the internal law of the Member States in case of conflict?<sup>1</sup> The following analysis of the Court's case-law in this respect will show that the doctrine of the supremacy of international agreements, including GATT, is well-established in respect of Community law proper as well as in relation to the municipal law of the Member States. First of all, however, it shall be examined how the Court dealt with the issue of supremacy in the relationship between Community law and Member State domestic law.

#### *B. The Supremacy of Community Law*

In *Costa v. ENEL*,<sup>2</sup> the Italian Government argued that the Court's ruling would be irrelevant to the solution of the main action, since the national tribunal which had made the reference would be bound to apply the national law in any event. The Court, however, stated:

The integration into the laws of each Member State of provisions which derive from the Community, and more generally the terms and the spirit of the Treaty, make it impossible for the States, as a corollary, to accord precedence to a unilateral and subsequent measure over a legal system accepted by them on a basis of reciprocity. Such a measure cannot therefore be inconsistent with that legal system. The executive force of Community law cannot vary from one State to another in deference to subsequent domestic laws, without jeopardizing the attainment of the objectives of the Treaty...<sup>3</sup>

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<sup>1</sup> See, e.g., P. Pescatore, 'Treaty-making by the European Communities', in: F.G. Jacobs and S. Roberts (eds.), *The Effect of Treaties in Domestic Law* 171 (1987), pp. 181/182.

<sup>2</sup> Case 6/64 *Costa v. ENEL*, [1964] E.C.R. 585.

<sup>3</sup> [1964] E.C.R. 585, at 589.

In the *Simmenthal* judgment,<sup>4</sup> the Court again stated that the duty of national courts to give precedence to Community law over national law extends to national legislation adopted after the incorporation of the relevant Community rules into the national legal order:

Furthermore, in accordance with the principle of the precedence of Community law, the relationship between provisions of the Treaty and directly applicable measures of the institutions on the one hand and the national law of the Member States on the other is such that those provisions and measures not only by their entry into force render automatically inapplicable any conflicting provision of current national law but - in so far as they are an integral part of, and take precedence in, the legal order applicable in the territory of each of the Member States - also preclude the valid adoption of new national legislative measures to the extent to which they would be incompatible with Community provisions.<sup>5</sup>

Recognition that national legislative measures incompatible with Community law had any legal effect, the Court said, would amount to a corresponding denial of the effectiveness of obligations undertaken unconditionally and irrevocably by the Member States and thus would jeopardize the very foundations of the Community.<sup>6</sup> Therefore, every national court must apply Community law in its entirety and protect rights which it confers on individuals, and must also "accordingly set aside any provision of national law which may conflict with it, whether prior or subsequent to the Community rule".<sup>7</sup> In the *Internationale Handelsgesellschaft* Case,<sup>8</sup> the Court held that no provision of national law, of whatever nature, could prevail over Community law lest it be deprived of its character as Community law and its very legal foundation be endangered. The validity of a Community act, the Court stated, remains unimpaired even if it is claimed that the basic rights of the national constitution were violated.<sup>9</sup> This brief summary of the Court's case-law shows that the supremacy of Community law is one of the basic doctrines which characterizes the Community legal order and determines its relationship to the domestic law of the Member States.<sup>10</sup>

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<sup>4</sup> Case 106/77 *Amministrazione delle Finanze dello Stato v. Simmenthal SpA*, [1978] E.C.R. 629.

<sup>5</sup> [1978] E.C.R. 629, at 643 (paragraph 17).

<sup>6</sup> [1978] E.C.R. 629, at 643 (paragraph 18).

<sup>7</sup> [1978] E.C.R. 629, at 644 (paragraph 21).

<sup>8</sup> Case 11/70 *Internationale Handelsgesellschaft mbH v. Einfuhr- und Vorratstelle für Getreide und Futtermittel*, [1970] E.C.R. 1125.

<sup>9</sup> [1970] E.C.R. 1125, at 1127.

<sup>10</sup> See D. Lasok and J.W. Bridge, *Law and Institutions of the European Communities*, (5th ed. 1991), p. 173.

### *C. The Supremacy of International Agreements*

As regards secondary Community law, one would be tempted to simply refer to Article 228(7) EC and argue that the wording indicates an interpretation to the effect that the binding character of agreements implies a rank superior to legislative acts.<sup>11</sup> On the other hand, it also could be argued perhaps that this provision provides for the applicability of international agreements by the Community institutions and the Member States without determining the priority issue. The former interpretation, however, would be the one in conformity with the case-law of the Court of Justice. The Court has indicated that acts of the Community would be declared invalid if a violation of international law could be established.<sup>12</sup> International agreements binding upon the Community form an integral part of the Community legal system and must be observed. In particular, so it seems, by the Member States. Obligations which derive from such international agreements have to be qualified as "obligations under the Treaty".<sup>13</sup> Non-compliance with such obligations could lead to an action for disrespect of Community obligations. As stated previously, the Court held in *Kupferberg* that "in ensuring respect for commitments arising from an agreement concluded by the Community institutions, the Member States fulfil an obligation not only in relation to the non-member country concerned but also and above all in relation to the Community which has assumed responsibility for the due performance of the agreement".<sup>14</sup> In Member States of a dualist nature, where the priority of international agreements as such over domestic law is not recognized, this leads to a peculiar situation: international agreements have further reaching effects when applied via Community law than when they would be entered into separately by the individual Member State concerned.<sup>15</sup>

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<sup>11</sup> See K.M. Meessen, 'The Application of Rules of Public International Law within Community Law', 13 C.M.L.Rev. 485 (1976), p. 498.

<sup>12</sup> *Ibid.*

<sup>13</sup> See Article 169 of the EC Treaty.

<sup>14</sup> Case 104/81 *Hauptzollamt Mainz v. C.A. Kupferberg & Cie* [1982] E.C.R. 3641, at 3662 (paragraph 13).

<sup>15</sup> See Pescatore, *supra* note 1, at 184.

### D. The Supremacy of GATT

In its *Radio-tubes* judgment,<sup>16</sup> the Court of Justice made clear that only the EC Treaty is superior to the Community's international commitments. In this case, the Italian authorities had argued that it could maintain a certain tariff which resulted from a GATT agreement not only against third contracting parties, but also against the other Member States. The Court did not accept that within the Community legal system Italy's rights under the GATT should have priority over its obligations under the EC Treaty. The Court held that by virtue of the principles of international law, by assuming a new obligation which is incompatible with rights held under a prior treaty, a State *ipso facto* gives up the exercise of these rights to the extent necessary for the performance of its new obligations.<sup>17</sup> And in matters governed by the EC Treaty, "that Treaty takes precedence over agreements concluded between Member States before its entry into force, including agreements made within the framework of GATT".<sup>18</sup> This principle of international law was later codified in the Vienna Convention on the Law of Treaties.<sup>19</sup> Article 30(3) of the Vienna Convention provides that: "When all the parties to the earlier treaty are parties also to the later treaty but the earlier treaty is not terminated or suspended in operation under article 59, the earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty".<sup>20</sup> Italy's invocation of Article 234 EC, according to which "the rights and obligations arising from agreements concluded before the entry into force of this Treaty between one or more Member States on the one hand, and one or more third countries on the other shall not be affected by the provisions of this Treaty" was declined by the Court on the grounds that the terms "rights and obligations" in Article 234 refer as regards "rights", to the rights of third States, and as regards "obligations" to the obligations of Member States. Article 234 therefore only guarantees the rights held by third countries under earlier agreements.<sup>21</sup>

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<sup>16</sup> Case 10/61 *Commission v. Government of the Italian Republic*, [1962] E.C.R. 1.

<sup>17</sup> [1962] E.C.R. 1, at 10.

<sup>18</sup> *Ibid.*

<sup>19</sup> On the Vienna Convention see I. Brownlie, *Principles of Public International Law* (4th. ed. (1990), pp. 603-635.

<sup>20</sup> For the full text of the Vienna Convention see I. Brownlie (ed.), *Basic Documents in International Law* (3rd. ed. 1983), pp. 349-386.

<sup>21</sup> [1962] E.C.R. 1, at 10.

In the *Third International Fruit Company Case*,<sup>22</sup> Advocate-General Mayras argued that "there is no doubt that just as the Court has constantly asserted the precedence of Community law over the national laws of Member States it cannot but recognize the superiority of the Community's international agreements over the measures adopted by its institutions. It is inconceivable to apply two different systems of reasoning according to whether it is a question of relations governed by Community law and external international law".<sup>23</sup> The Court of Justice subsequently declared that the validity of a Community act may be affected by the fact that it is contrary to a rule of international law.<sup>24</sup> Stein has argued that it is therefore reasonable to deduce from the *Third International Fruit Company Case* that an international agreement prevails over a regulation regardless of whether the latter was adopted before or after the conclusion of the agreement. In his view, "the holding so interpreted follows the evolving modern constitutional practice that recognizes the necessity of granting international commitments superior recognition in domestic law, in the interest of a more stable world order".<sup>25</sup> Another indication of the superiority of GATT is provided by the *SIOT* judgment<sup>26</sup> where the Court stated that the fact that GATT does not have direct effect "in no way affects the Community's obligation to ensure that the provisions of GATT are observed in its relations with non-member States which are parties to GATT".<sup>27</sup>

In *SIOT* and *SPI/SAMI*,<sup>28</sup> one of the questions referred to the Court of Justice was whether the Court had jurisdiction to interpret the GATT provisions even where the national court was requested to interpret them for purposes other than that of determining whether or not

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<sup>22</sup> Joined Cases 21-24/72 *International Fruit Company and Others v. Produktschap voor Groenten en Fruit*, [1972] E.C.R. 1219.

<sup>23</sup> [1972] E.C.R. 1219, at 1233/1234.

<sup>24</sup> [1972] E.C.R. 1219, at 1226 (paragraphs 5 and 6).

<sup>25</sup> See E. Stein, 'External Relations of the European Community: Structure and Process', in: *Collected Courses of the Academy of European Law* 115 (1990), p. 169.

<sup>26</sup> Case 266/81 *Societa Italiana per l'Oleodotto Transalpino (SIOT) v. Ministero delle Finanze, Ministero della Marina Mercantile, Circonscrizione doganale di Trieste and Ente Autonomo del Porto di Trieste*, [1983] E.C.R. 731.

<sup>27</sup> [1983] E.C.R. 731, at 780 (paragraph 28).

<sup>28</sup> Joined Cases 267-269/81 *Amministrazione delle Finanze dello Stato v. Societa Petrolifera Italiana SpA (SPI) and SpA Michelin Italiana (SAMI)*, [1983] E.C.R. 801.



a Community measure was valid.<sup>29</sup> According to Advocate-General Reischl, it was impossible to distinguish between the situation where a GATT provision is relevant to the assessment of Community measures or is to be considered in order to determine the compatibility of a national law with GATT.<sup>30</sup> The Court agreed and held, in *SPI/SAMI*, that:

... the jurisdiction conferred upon the Court in order to ensure the uniform interpretation of Community law must include a determination of the scope and effect of the rules of GATT within the Community ... In that regard it does not matter whether the national court is required to assess the validity of Community measures or the compatibility of national legislative provisions with the commitments binding the Community.<sup>31</sup>

### *E. Conclusion*

As noted above, the supremacy of Community law in respect of the domestic law of the Member States is one of the basic concepts of the Community legal system. It has been said that "it was only logical to extend this scale of values to the relationship between internal Community law and international commitments binding the Community".<sup>32</sup> In theory, the ranking is thus as follows. The superior EC Treaty is followed by the rules of international law binding upon the Community. These rules prevail over rules of secondary Community law, whether they have been enacted before or after the entry into force of the rule of international law. GATT is thus ranked below the EC Treaty itself, but prevails over conflicting rules of secondary Community law and also Member State domestic law, no matter whether it has been enacted before or after the entry into force of the GATT provision.<sup>33</sup> According to Jackson, many of the arguments for and against direct application of international agreements are accentuated when a directly applied treaty norm has a higher

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<sup>29</sup> [1983] E.C.R. 731, at 736; [1983] E.C.R. 801, at 807.

<sup>30</sup> [1983] E.C.R. 731, at 789.

<sup>31</sup> [1983] E.C.R. 801, at 828 (paragraph 15).

<sup>32</sup> See Pescatore, *supra* note 1, at 182.

<sup>33</sup> See Meessen, *supra* note 11, at 500. Cf. E.-U. Petersmann, 'Application of GATT by the Court of Justice of the European Communities', 20 C.M.L.Rev. 397 (1983), p. 401. Cf. P. Pescatore, 'Die Rechtssprechung des Europäischen Gerichtshof zur innergemeinschaftlichen Wirkung völkerrechtlicher Abkommen', in: R. Bernhardt (ed.), *Völkerrecht als Rechtsordnung, Festschrift für H. Mosler* 661 (1983), p. 672.

hierarchical status in a domestic legal system than most other laws.<sup>34</sup> Without higher status, a later statute might rectify some of the problems. With higher status, however, the problems become much more complex. For example, when some States do not directly apply treaty norms while others do so with a higher status, the asymmetry in obligations is widened. Those States are more "locked into the norms" than the other parties to the agreement.<sup>35</sup> The directly applicable norm with higher status imposes a "constitutional" rigidity on future government action. Of course, constitutions should contain norms believed so essential to government that they need to impose rigidity. Many governments, however, feel hampered by treaty norms, especially on economic subjects.<sup>36</sup> These governments will try to escape judicial review of legislation in breach of international obligations.

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<sup>34</sup> See J.H. Jackson, 'Status of Treaties in Domestic Legal Systems: A Policy Analysis', 86 A.J.I.L. 310 (1992), p. 330.

<sup>35</sup> *Ibid.*

<sup>36</sup> See Jackson, *supra* note 34, at 331.



## VI

### *The Interpretation of GATT*

#### *A. Introduction*

WHEN, in a preliminary procedure, the Court of Justice recognizes the direct effect of an international agreement, implicitly or explicitly, its next step is to interpret the relevant provision(s). In a direct procedure before the Court under Article 173 EC, direct effect is not a requirement. The preceding issue is here whether the plaintiff is privileged or non-privileged. Private parties are non-privileged plaintiffs and must be able to show direct and individual concern.<sup>1</sup> The Council, the Commission and the Member States are privileged and do not have to fulfill these requirements. In the following sections, the reasons underlying the dynamic interpretation of Community law proper will be examined first. We will then see that the Court adopts a different approach in interpreting international agreements. Since GATT has not been allowed to transgress the Court's direct effect blockade, the interpretation of this agreement in preliminary proceedings remains an open question. However, GATT provisions have been interpreted in direct actions before the European Court.

#### *B. The Interpretation of Community Law*

Traditional international tribunals usually interpret the obligations of sovereign States in a restricted manner. Interpretation is a static process, since its objective is to define the extent of the concessions of the contracting parties towards each other.<sup>2</sup> The European Court of Justice, however, in interpreting Community law, has behaved much more as a national court

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<sup>1</sup> The Court's practice of restrictive interpretation of access via the Article 173 channel has been strongly criticized. See, e.g., H. Rasmussen, 'Why is Article 173 interpreted against Private Plaintiffs?', 5 E.L.Rev. 112 (1980).

<sup>2</sup> See P. Pescatore, 'International Law and Community Law - A Comparative Analysis', 7 C.M.L.Rev. 167 (1970), p. 173.

would be expected to behave in a national context.<sup>3</sup> According to Pescatore, the way in which the Treaties were drafted simply called for a dynamic process of interpretation, since it was the intention of its drafters to set in motion a process of evolution towards definite ends. Interpretation of Community law is essentially a function of the common objectives of the Member States and of a particular vision of the future. The interpretation of Community law is based on the vision of a European unity which is to be built.<sup>4</sup>

### *C. The Interpretation of International Agreements*

What are the consequences of the transposition of the Court's direct effect doctrine to international agreements for the substantive interpretation of international agreements? The Court of Justice always has left open the possibility of interpreting differently the provisions of an agreement which were similar to, or even identical with, the provisions of the Treaty. In the *Bouhelier* rulings,<sup>5</sup> the Court stated that the meaning of Treaty provisions may not be transposed to relations with non-member States. The Court held that:

... it must be emphasized that the view adopted by the Court in its judgment of 3 February 1977 concern intra-Community relations, the characteristic feature of which is a complete liberalization of trade, as a result of the abolition of all obstacles to imports and exports. Those provisions cannot as such be transposed to relations with non-member countries. The question of abolishing quantitative restrictions and measures having equivalent effect in relations with the three non-member countries (...) must be considered in the light of the agreements in force between the Community and the States in question.<sup>6</sup>

In the *Pabst* Case,<sup>7</sup> the Court referred to the similarity in wording of Article 53(1) of the Association Agreement and Article 95 of the EC Treaty, but the former provision was read in the context of the Association Agreement. From this wording, and from the "objective and nature" of the Association Agreement of which it formed a part, the Court argued, it followed that Article 53(1) prohibited more favourable tax treatment for domestic spirits than for those

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<sup>3</sup> See A.M. Donner, 'The Constitutional Powers of the Court of Justice of the European Communities', 11 C.M.L.Rev. 127 (1974), p. 135.

<sup>4</sup> See Pescatore, *supra* note 1, at 173/174.

<sup>5</sup> Case 53/76 *Procureur de la Republique, Besancon v. Bouhelier and Others*, [1977] E.C.R. 197; Case 225/78 *Procureur de la Republique, Besancon v. Bouhelier and Others*, [1979] E.C.R. 3151.

<sup>6</sup> [1979] E.C.R. 3151, at 3160 (paragraph 6).

<sup>7</sup> Case 17/81 *Pabst & Richarz KG v. Hauptzollamt Oldenburg*, [1982] E.C.R. 1331.

imported from Greece.<sup>8</sup> *Polydor*<sup>9</sup> is perhaps the clearest example of how a similar or identical provision can have two different meanings if it is placed in different contexts. The Portugal Agreement, the Court held, "does not have the same purpose as the EEC Treaty, inasmuch as the latter, ..., seeks to create a single market reproducing as closely as possible the conditions of a domestic market". It therefore followed that "in the context of the Agreement restrictions on trade in goods may be considered to be justified on the ground of the protection of industrial and commercial property in a situation in which their justification would not be possible within the Community".<sup>10</sup> In *Kupferberg*,<sup>11</sup> the Court of Justice reaffirmed that similarity of terms is not a sufficient reason for transposing to the provisions of international agreements the case-law on provisions of the EC Treaty dealing with intra-Community trade. The provisions of these agreements are to be interpreted "in the light of both the objective and purpose of the agreement and of its context".<sup>12</sup> It held that:

... it must be observed that although Article 21 of the Agreement and Article 95 of the EEC Treaty have the same object inasmuch as they aim at the elimination of tax discrimination, both provisions, which are moreover worded differently, must however be considered and interpreted in their own context.<sup>13</sup>

As the Court has already stated in its judgment of 9 February 1982 in Case 270/80 *Polydor* ..., the EEC Treaty and the Agreement on free trade pursue different objectives. It follows that the interpretations given to Article 95 of the Treaty cannot be applied by way of simple analogy to the Agreement on free trade.<sup>14</sup>

In its *Opinion 1/91*,<sup>15</sup> on the compatibility with the EC Treaty of the system of judicial supervision under the envisaged agreement between the Community and the members of the EFTA, the Court of Justice once again confirmed this point of view in stating that:

the fact that the provisions of the agreement and the corresponding Community provisions are identically worded does not mean that they must necessarily be interpreted identically. An international treaty is to be interpreted not only on the basis of its wording, but also in the light

<sup>8</sup> [1982] E.C.R. 1331, at 1350 (paragraphs 26 and 27).

<sup>9</sup> Case 270/80 *Polydor and RSO Records v. Harlequin Record Shops and Simons Records*, [1982] E.C.R. 329.

<sup>10</sup> [1982] E.C.R. 329, at 349 (paragraphs 18 and 19).

<sup>11</sup> Case 104/81 *Hauptzollamt Mainz v. C.A. Kupferberg & Cie*, [1982] E.C.R. 3641.

<sup>12</sup> [1982] E.C.R. 3641, at 3665 (paragraph 23).

<sup>13</sup> [1982] E.C.R. 3641, at 3666 (paragraph 29).

<sup>14</sup> [1982] E.C.R. 3641, at 3666 (paragraph 30).

<sup>15</sup> *Opinion 1/91 Draft agreement between the Community and the countries of the European Free Trade Association, relating to the creation of the European Economic Area*, *Opinion* of 14 December 1991. See also *Opinion 1/92* of 10 April 1992 on the same topic.

of its objectives.<sup>16</sup>

With regard to the comparison of the objectives of the provisions of the agreement and those of Community law, it must be observed that the agreement is concerned with the application of rules on free trade and competition in economic and commercial relations between the Contracting Parties.<sup>17</sup>

In contrast, as far as the Community is concerned, the rules on free trade and competition, which the agreement seeks to extend to the whole territory of the Contracting Parties, have developed and form part of the Community legal order, the objectives of which go beyond that of the agreement.<sup>18</sup>

In the view of the Court, the objective of homogeneity in the interpretation and application of the law in the EEA - laid down by Article 6 of the draft agreement - could not be attained, because of the divergences between the aims and context of the draft agreement, on the one hand, and the aims and context of Community law, on the other.<sup>19</sup>

#### *D. The Interpretation of GATT*

In the *Fediol IV* Case,<sup>20</sup> concerning a direct action under Article 173 of the EC Treaty, the Court decided that it could interpret GATT provisions in a lawsuit based on the new commercial policy instrument.<sup>21</sup> The facts of this case were as follows. In February 1986, Fediol filed a complaint with the Commission under Article 3 of Council Regulation 2641/84 "on the strengthening of the common commercial policy with regard in particular to protection against illicit practices", in which it requested the initiation of an examination procedure concerning certain illicit commercial practices of Argentina with regard to the export of soya products to the Community. According to Fediol, the practices caused serious damage to the European oil-processing industry. Under the regulation, "illicit commercial practices" are any international trade practices attributable to non-member countries which are incompatible with international law or with the generally accepted rules, whereby the

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<sup>16</sup> Opinion 1/91 (paragraph 14).

<sup>17</sup> Opinion 1/91 (paragraph 15).

<sup>18</sup> Opinion 1/91 (paragraph 16).

<sup>19</sup> Opinion 1/91 (paragraph 29).

<sup>20</sup> Case 70/87 *Federation de l'industrie de l'huilerie de la CEE (Fediol) v. Commission*, [1989] E.C.R. 1781.

<sup>21</sup> On the new commercial policy instrument see, e.g., M.I.B. Arnold and M.C.E.J. Bronckers, 'The EEC New Trade Policy Instrument: Some Comments on Its Application', 22 J.W.T. 19 (1988); J.H.J. Bourgeois, 'EC Rules Against "Illicit Trade Practices" - Policy Cosmetics or International Law Enforcement?', Ann. Proc. Fordham Corp. L. Inst. 6-I (1988).

drafting history indicated that GATT was meant. In its complaint, Fediol argued that the practices were incompatible with Articles III, XI and XXIII of the GATT, either individually or jointly.<sup>22</sup> The Commission, however, rejected the complaint on the grounds that, *inter alia*, the levying of differential duties was, in its view, not contrary to any of the rules mentioned. Before the Court of Justice, the Commission argued that when, as in this case, its decision deals with the interpretation of GATT provisions, the complainant cannot be permitted to put forward submissions calling that interpretation into question. The interpretation which the Commission, pursuant to Regulation 2641/84, places on the term "illicit commercial practice" and on the rules of international law, in particular those of GATT, is subject to review by the Court only in so far as the disregard or misapplication of those rules amounts to an infringement of the provisions of Community law which vest rights in individuals. The GATT provisions, however, are not sufficiently precise to give rise to such rights on the part of individuals.<sup>23</sup> According to Advocate-General van Gerven, it was clear that the general reference in Council Regulation 2641/84 could not "at a stroke" confer direct effect within the Community on GATT provisions which, according to the case-law of the Court, on the basis of their spirit, general scheme and terms do not have direct effect. But they do become capable of being invoked by individuals to the extent that, explicitly or implicitly, that effect can be inferred from the Community rule referring to those provisions.

The Court of Justice also rejected the Commission's narrow viewpoint on these grounds. It stated that although the Court has held on several occasions that various GATT provisions did not have direct effect, it could not be concluded from those judgments that individuals may not rely on the provisions of GATT in order to obtain a ruling on whether conduct criticized in a complaint lodged under the new commercial policy instrument constituted an illicit commercial practice. The GATT provisions form part of the rules of international law to which the new instrument refers.<sup>24</sup> Although, the Court stated, it has held in its GATT direct effect case-law that a particular feature of GATT is the broad flexibility of its provisions, this may not prevent the Court from interpreting and applying the rules of GATT in order to establish whether certain specific commercial practices should be considered incompatible with those rules, since "the GATT provisions have an independent meaning

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<sup>22</sup> In its observations submitted to the Commission on 9 May 1986, Fediol held that the practices were also contrary to Articles XX and XXXVI of GATT.

<sup>23</sup> [1989] E.C.R. 1781, at 1786.

<sup>24</sup> [1989] E.C.R. 1781, at 1830/1831 (paragraph 19).



which, for the purposes of their application in specific cases, is to be determined by way of interpretation".<sup>25</sup> The Court concluded that:

..., since Regulation No. 2641/84 entitles the economic agents concerned to rely on the GATT provisions in the complaint which they lodge with the Commission in order to establish the illicit nature of the commercial practices which they consider to have harmed them, those same economic agents are entitled to request the Court to exercise its powers of review over the legality of the Commission's decision applying those provisions.<sup>26</sup>

The *Fediol* judgment demonstrates that the GATT provisions are not that flexible after all. Apparently, their content can be legally defined. The Court of Justice takes a more honest approach here and admits that there is nothing wrong with the rules of GATT as such.<sup>27</sup> GATT provisions may to a certain extent be imprecise, but many of them are sufficiently clear and unconditional to be capable of being applied by the courts. In GATT practice, there has indeed never been a dispute settlement proceeding in which a GATT rule was held not to be justiciable. Any GATT provision can be invoked and applied in GATT dispute settlement procedures.<sup>28</sup> The Court of Justice is only willing to apply and interpret GATT rules, however, if Community law makes a clear reference to these rules.

Under the new commercial policy instrument, individuals can only complain about the illicit commercial practices of third states, not about illicit practices of the Community institutions. In the *Nakajima* Case,<sup>29</sup> however, the Court of Justice declared that not only acts of foreign governments but also Community acts could be ruled incompatible with GATT. The facts of this case may be summarized as follows. The Japanese company Nakajima manufactures dot-matrix printers and typewriters. An anti-dumping investigation initiated by the Commission led to the adoption of a regulation imposing anti-dumping duties on imports of typewriters originating in Japan. Nakajima challenged this regulation, *inter alia*, on the ground of the incompatibility of the basic Anti-dumping Regulation 2423/88 with the GATT Anti-dumping Code. According to Nakajima, Article 2(3)(b)(ii) on the assessment of normal value was

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<sup>25</sup> [1989] E.C.R. 1781, at 1831 (paragraph 20).

<sup>26</sup> [1989] E.C.R. 1781, at 1831 (paragraph 22).

<sup>27</sup> See M.C.E.J. Bronckers, annotation Case 70/87, 38 S.E.W. 171 (1983), p. 171.

<sup>28</sup> See E.-U. Petersmann, 'The EEC as a GATT Member - Legal Conflicts Between GATT Law and European Community Law', in: M. Hilf, F.G. Jacobs and E.-U. Petersmann (eds.), *The European Community and GATT* 23 (1986), p. 50.

<sup>29</sup> Case C-69/89 *Nakajima All Precision Co. Ltd. v. Council*, [1991] E.C.R. I-2069. See also Case 105/90 *Goldstar v. Council*, [1992] E.C.R. 667; Case C-175/88 *Matsushita Electric v. Council*, [1992] E.C.R. I-1409; Case C-188/88 *NMB v. Commission*, [1992] E.C.R. I-1689.

incompatible with Articles 2(4) and 2(6) of the Anti-dumping Code. In the view of the Council and the intervening Commission, individuals did not have the possibility to invoke this GATT agreement in court in the light of the Court's case-law on the subject. Both the Advocate-General and the Court of Justice, however, denied the relevance of the direct effect case-law. The Court seemed to confirm that direct effect is a requirement only if an action is brought by a private party before a national court and reaches the Court in a preliminary procedure.<sup>30</sup> It stated:

The Council takes the view that, as is the case with the General Agreement, the Anti-Dumping Code does not confer on individuals rights which may be relied on before the Court and that the provisions of that Code are not directly applicable within the Community. From this the Council concludes that Nakajima cannot place in question the validity of the new basic regulation on the ground that it may be in breach of certain provisions in the Anti-Dumping Code.<sup>31</sup>

It should, however, be pointed out that Nakajima is not relying on the direct effect of those provisions in the present case. In making this plea in law, the applicant is in fact questioning, in an incidental manner under Article 184 of the Treaty, the applicability of the new basic regulation by invoking one of the grounds for review of legality referred to in Article 173 of the Treaty, namely that of infringement of the Treaty or of any rule of law relating to its application.<sup>32</sup>

According to its preamble, the basic regulation, the Court continued, was adopted in accordance with existing obligations, in particular those arising from Article VI of the General Agreement, and from the Anti-dumping Code.<sup>33</sup> Just like the General Agreement, the Anti-dumping Code has the effect of binding the Community. The Community is therefore under the obligation to ensure compliance with the General Agreement and its implementing measures.<sup>34</sup> When Community law refers to GATT, GATT rules may serve as a legal basis for the Court's review of legality. Only when the Community executive has indicated that it wants to be bound by GATT, by making reference to it, private parties are allowed to invoke GATT rules to defend their rights. Since the Council often makes reference to international obligations in Community legislation, and also when the legislation specifically deals with matters covered by GATT, it could be argued that when the Council refers in such cases it thus indicates that it wishes to be bound by GATT.

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<sup>30</sup> Cf. F. Castillo de la Torre, 'The Status of GATT in EEC Law: Some New Developments', 26 J.W.T. 35 (1992), p. 40.

<sup>31</sup> [1991] E.C.R. I-2069, at I-2177 (paragraph 27).

<sup>32</sup> [1991] E.C.R. I-2069, at I-2178 (paragraph 28).

<sup>33</sup> [1991] E.C.R. I-2069, at I-2178 (paragraph 30).

<sup>34</sup> [1991] E.C.R. I-2069, at I-2178 (paragraph 31).

### E. Conclusion

There seems to be no real need for the denial of direct effect of GATT with artificial constructions, when the Court can also deal with GATT on the level of interpretation. An analysis of the case-law of the Court of Justice reveals that a similarity between the wording of provisions in different treaties is no guarantee that these provisions will be interpreted in the same way. Provisions of international agreements are to be interpreted in the light of the objective, purpose and context of the agreement. Article 95 of the EC Treaty was modelled on Article III of GATT and these provisions are therefore similar. There is no objection against a different interpretation of Article III, as long as the core of the prohibition remains intact. Direct effect would at least permit the Community trader his day in court. In a preview of the Court's *Banana* judgment, Hahn and Schuster expressed the hope that the *Nakajima* construction might have been intended as a 'golden bridge' to direct effect of GATT.<sup>35</sup> The Court's retreat, however, back into its conservative position has scattered this hope. By judgment of 5 October 1994, the Court of Justice prevented Germany from relying on the rules of GATT in a direct action under Article 173(1) of the EC Treaty.<sup>36</sup> In the view of the Court, the "features of GATT, from which the Court concluded that an individual within the Community cannot invoke it in a court to challenge the lawfulness of a Community act, also preclude the Court from taking provisions of GATT into consideration to assess the lawfulness of a regulation in an action brought by a Member State under the first paragraph of Article 173 of the Treaty".<sup>37</sup> According to the Court, these special features "show that the GATT rules are not *unconditional* and that an obligation to recognize them as rules of international law which are directly applicable in the domestic legal systems of the contracting parties cannot be based on the spirit, general scheme or terms of GATT".<sup>38</sup>

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<sup>35</sup> See M.J. Hahn and G. Schuster, 'Zum Verstoß von gemeinschaftlichem Sekundärrecht gegen das GATT: Die gemeinsame Marktorganisation für Bananen vor dem EuGH', 28 EuR 261 (1993), p. 278.

<sup>36</sup> Case C-280/93 *Federal Republic of Germany v. Council of the European Union*, not yet reported.

<sup>37</sup> Paragraph 109.

<sup>38</sup> Paragraph 110 (emphasis added). Castillo de la Torre points to the different wording of the Advocate General. Gulmann AG accepts that GATT rules can be unconditional and rather bases his view on GATT's allegedly weak structure. See F. Castillo de la Torre, 'The Status of GATT in EC Law, Revisited: The Consequences of the Judgment on the Banana Import Regime for the Enforcement of the Uruguay Round Agreements', 29 J.W.T. 53 (1995), p. 59. In *International Fruit*, however, it was Mayras AG who referred to the unconditionality of certain GATT provisions and the Court based its judgment on the flexibility of the rules (the weak structure), apparently deducing this flexibility from an alleged unconditionality of the rules. Therefore, not too much should be made of the difference in

Therefore "it is only if the Community intended to implement a particular obligation entered into within the framework of GATT, or if the Community act expressly refers to specific provisions of GATT, that the Court can review the lawfulness of the Community act in question from the point of view of the GATT rules".<sup>39</sup> Part 2 of this study will analyze this case in more detail. Attention will be directed towards the possible infringement of individual rights by the Community executive when using trade policy instruments in violation of GATT law.

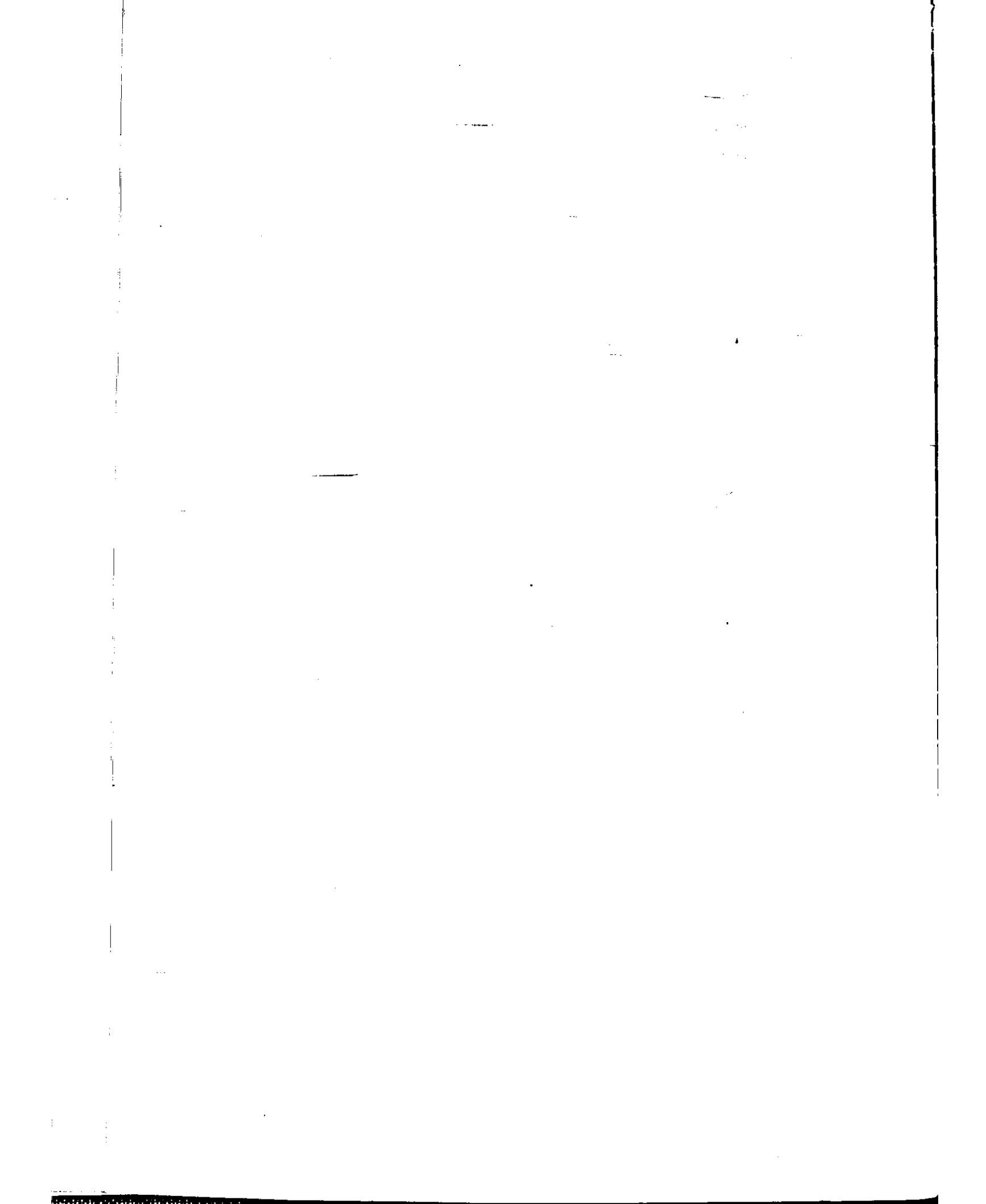
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wording.

<sup>39</sup> Paragraph 111.

***PART 2***

***CASE-STUDY: GERMANY VERSUS COUNCIL***



## VII

### *The Common Market in Bananas: Public Interest versus Individual Rights*

#### *A. Introduction*

IN February 1993, the Council of Ministers adopted Regulation 404/93 on the common organization of the market in bananas.<sup>1</sup> The regulation provided the basis for a free circulation of bananas between the Member States and established a common import regime as regards third countries. Since its adoption had been the subject of great controversy and passionate debate in the Council, it came as no great surprise that the document soon landed on the desks of the judges in Luxemburg. In May 1993, Germany brought an action under Article 173, first paragraph, of the EC Treaty for a declaration that Article 21(2) and Title IV of the regulation were void.<sup>2</sup> In its application Germany was supported by The Netherlands and Belgium while France, Greece, Italy, Portugal, Spain, the United Kingdom, and the European Commission intervened in support of the Council. Earlier, Germany also had applied for interim measures but this request was declined.<sup>3</sup> In addition to the German government, several companies contested the legality of the regulation. They lodged complaints under Article 173, second paragraph,<sup>4</sup> for a declaration that the regulation was

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<sup>1</sup> Council Regulation (EEC) No. 404/93 on the common organization of the market in bananas, 13 February 1993, OJ L 47/1 (25 February 1993).

<sup>2</sup> Case C-280/93 *Federal Republic of Germany v. Council of the European Union*, not yet reported. Article 21(2) provides for the discontinuance of special rules which have been applicable to Germany since the entry into force of the EEC Treaty and Title IV describes the rules applicable to third countries.

<sup>3</sup> Case C-280/93 *Federal Republic of Germany v. Council of the European Union*, Order of 29 June 1993, not yet reported. Germany has also requested the Court of Justice to deliver an opinion on the question whether the framework agreement on bananas, signed by the Commission on 28 and 29 March 1994, was properly negotiated from the point of view of legal procedure and on the question whether this agreement is compatible with (substantive) provisions of the EC Treaty. See Opinion 3/94, request by the Federal Republic of Germany, OJ C275/9.

<sup>4</sup> This is now the fourth paragraph.

void and/or applied for compensation under Article 178 EC.<sup>5</sup> All requests under Article 173 were quickly dismissed for lack of standing<sup>6</sup> while the applications for compensation were transferred to the Court of First Instance (CFI). The CFI stayed the proceedings pending judgment of the Court of Justice in *Germany v. Council*.<sup>7</sup> Moreover, the Verwaltungsgericht Frankfurt am Main referred questions to the ECJ for a preliminary ruling under Article 177 of the EC Treaty.<sup>8</sup>

Council Regulation 404/93 also sowed considerable discord on the international plain. Several Latin American banana-exporting countries felt the regulation infringed basic GATT obligations, while the countries which received preferential treatment under the regulation, the African, Caribbean and Pacific States (ACP States), considered they had a right to such preferential treatment under the Fourth Lomé Convention.<sup>9</sup> The Latin American, non-privileged countries decided to take action. They first requested Article XXII consultations with the Community regarding both the national market organizations of several Member States and the proposed common regime. After these consultations had failed they requested panels in order to examine the consistency with GATT law of the national market organizations and the common regime.

The aim of this case-study is twofold. The first aim is to examine whether the legislation under scrutiny was adopted in the Community public interest. This examination will involve an overview of studies and reports pertaining to the common banana regime. The second aim is to reveal the Court's dilemma in trying to balance public interest and individual rights in

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<sup>5</sup> Case C-256/93 *Pacific Fruit Company v. Council and Commission*; Case C-257/93 *Léon van Parijs and Others v. Council and Commission*; Case C-262/93 *Anton Dürbeck v. Council and Commission*; Case C-276/93 *Chiquita Banana Company v. Council*; Case C-282/93 *Comafrika and Others v. Council and Commission*; Case C-283/93 *Pacific Fruit Company Italy v. Council and Commission*; Case C-286/93 *Atlanta and Others v. Council and Commission*; Case C-287/93 *Simba SpA v. Council*; Case C-288/93 *Comaco v. Council*.

<sup>6</sup> See the Orders of the Court of 21 June 1993 in the respective cases.

<sup>7</sup> Case T-516/93 *Pacific Fruit Company v. Council and Commission*; Case T-517/93 *Léon van Parijs and Others v. Council and Commission*; Case T-518/93 *Anton Dürbeck v. Council and Commission*; Case T-519/93 *Comafrika v. Council and Commission*; and Case T-520/93 *Pacific Fruit Company Italy v. Council and Commission*.

<sup>8</sup> Case C-465/93 and Case C-466/93 *Atlanta and Others v. Federal Republic of Germany*.

<sup>9</sup> See Fourth ACP-EEC Convention, signed in Lomé on 15 December 1989, approved on 25 February 1991, OJ L 229 (17 August 1991).



the area of foreign trade policy. This first chapter of the case-study is divided into eight sections, including this introduction (A) and a conclusion (H). Sections B and C are introductory, with section B giving a brief survey of the banana industry and section C giving a summary of the content of the regulation. Sections D and E then consider the immediate consequences of the regulation and the dispute in GATT, respectively, while F and G are devoted to the case before the Court of Justice insofar as it deals with the issue of the protection of individual rights.

### *B. The Banana Industry*

After coffee, the banana is the most traded foodstuff in the world. In 1991, global trade in bananas represented a value of more than 5 billion U.S. dollars.<sup>10</sup> Since 1988, the European Community is the largest banana importer in the world, followed by the United States and Japan.<sup>11</sup> It imports bananas from two distinct sources, namely, from ACP States (hereinafter: ACP-bananas); and from so-called third countries (hereinafter: TC-bananas). The traditionally favoured ACP-bananas originate in such countries as Belize, Cameroon, Ivory Coast, Jamaica, Somalia, Surinam, and the Windward Islands. TC-bananas are imported mainly from Colombia, Costa Rica, Ecuador, Honduras and Panama. The Community also produces its own bananas (hereinafter: EC-bananas), namely, in the Canary Islands (Spain), Crete (Greece), Madeira (Portugal) and Guadeloupe and Martinique (the French *départements d'outre-mer*). Before the organization of the market, EC- and ACP-bananas each accounted for about 20% of Community consumption while TC-bananas covered about 60%.<sup>12</sup>

Bananas are cultivated all the year round in (sub-)tropical regions and are very sensitive to climatic conditions. When not grown under optimal conditions, it takes longer to grow them and they become smaller. For that reason, there are significant differences in both price and quality between bananas from different areas. TC-bananas are much cheaper and of higher quality than ACP-bananas which in turn are cheaper and of higher quality than EC-bananas. In the United Kingdom, for example, 1992 fob prices for TC-bananas were on average 242

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<sup>10</sup> See FAO, *Trade Yearbook* (1991).

<sup>11</sup> See CES(91) 1012, at 2 and Nimex 1991 and 1992.

<sup>12</sup> According to Advocate General Gulmann in Case 280/93 (paragraphs 14-16).

ECU per tonne, for ACP-bananas 466 ECU per tonne and for EC-bananas 551 ECU per tonne.<sup>13</sup> These considerable differences are caused not only by variations in climatic conditions in the countries and regions of production, but also by differences in the size of holdings. In the countries where TC-bananas are grown these holdings are often thousands of hectares while in the Caribbean, where most ACP-bananas come from, holdings can be very small, sometimes as small as only a few hectares. In the former countries, several efficiently operating American multinationals produce and market bananas.<sup>14</sup> The most important of these companies are United Brands (Chiquita), Castle & Cooke, Pacific Fruit and Del Monte.<sup>15</sup>

However, it would be inaccurate to say that these American companies completely dominate the Latin American banana industry. In most countries, relatively small independent banana farmers still own most of the holdings. Ecuador has about 3,400 independent farmers; approximately 2,500 possess farms of less than 20 hectares. In Guatemala, independent producers control 58% of total production.<sup>16</sup> Moreover, in the ACP countries much of the banana trade also is controlled by large multinational corporations. In Jamaica, the multinational Jamaica Producers manages the majority of production. All Windward Island production is exclusively marketed by the British multinational Geest while another British multinational, the Fyffes corporation, exclusively markets all production from Belize and Surinam. In Ivory Coast, SCB - a company owned by the French holding Terres Rouge Consultant - grows bananas on 2,000 hectares of the country's available 4,300 hectares.<sup>17</sup> For all countries concerned, ACP or non-ACP, income obtained from the export of bananas forms an essential part of their total export earnings and many of their workers in the banana industry will not easily find a job elsewhere. For the EC regions as well, banana production is important from both an economic and a social point of view. The preamble to Regulation 404/93 noted in particular the "social, economic, cultural and environmental importance of

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<sup>13</sup> See the Opinion of the Advocate General in Case 280/93 (paragraph 18).

<sup>14</sup> This is why these bananas are sometimes referred to as dollar-bananas.

<sup>15</sup> See CES(91) 1012, annex 2. See also FAO, *The World Banana Economy 1970-1984*, FAO Economic and Social Development Paper 57, Rome (1986), p. 8.

<sup>16</sup> See Rebuttal Submission of the Government of Guatemala Before the Article XXIII Dispute Settlement Panel Established to Review the European Economic Community's Common Organization of the Market for Bananas (hereinafter: Guatemala Rebuttal Submission), p. 3.

<sup>17</sup> *Ibid.*

banana-growing in the Community regions of the French Overseas Departments, Madeira, the Azores, the Algarve, Crete, Lakonia and the Canary Islands, which are regions characterized by insularity, remoteness and structural backwardness, aggravated in some cases by economic dependence on banana-growing".<sup>18</sup>

### *C. The Common Organization of the Market in Bananas*

#### 1. The National Market Organizations

Prior to the adoption of the regulation, the Community banana market was highly fragmented. In France, Greece, Italy, Portugal, Spain and the United Kingdom the markets were relatively closed. Quantitative restrictions reserved these markets for national bananas, ACP-bananas or both.<sup>19</sup> The markets of Belgium, Denmark, Germany, Ireland, Luxembourg and The Netherlands were relatively open. These countries simply purchased their bananas from the best sources, the third countries, but imports of these bananas were subject to a GATT-consolidated duty of 20% *ad valorem*.<sup>20</sup> There existed, however, a special arrangement for Germany. Based on a protocol annexed to the Rome Treaty, a duty-free scheme was applicable to this Member State. It was clear that the fragmentation of the market had to be brought to an end in order to complete both the common commercial policy and the internal market programme.<sup>21</sup> Besides, the protection of the national markets was extremely inefficient. According to a study conducted by the World Bank, the national arrangements

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<sup>18</sup> See the preamble to Council Regulation 404/93 (24th recital).

<sup>19</sup> In France, for example, 59.1% of imports came from the overseas departments and 40.9% from ACP States in 1991. See *Eurostat Import Statistics 1991* (1992). Italy used to buy mainly from its former colony Somalia (now an ACP country) but has, in recent years, predominantly imported its bananas from third countries.

<sup>20</sup> See Council Regulation 2658/87, 23 July 1987, OJ L 256/1 (7 July 1987), as amended by Council Regulation 2913/92, OJ L 301/1 (19 October 1992). The 20% tariff had been in force since 1963 with initial negotiating rights being held by Brazil.

<sup>21</sup> See also P. Eeckhout, *The European Internal Market and International Trade: A Legal Analysis* (1994), p. 226.

were "costly mechanisms for aiding preferential supplier countries."<sup>22</sup> It was calculated that adoption of a policy of free trade would result in an annual increase in EC welfare of 386 million U.S. dollars (based on 1987 prices).<sup>23</sup> The report concluded that "European economic integration in 1992 provides an opportunity to reform those policies and find more efficient mechanisms for providing aid".<sup>24</sup>

## 2. The Commission Proposal

The Commission proposal<sup>25</sup> had a highly ambitious objective: "Whereas, so that the Community can respect its various international obligations, that common organization of the market should permit bananas produced in the Community and those from the ACP States which are traditional suppliers to be disposed of on the Community market at fair prices for both producers and consumers without undermining imports of bananas from other third country suppliers".<sup>26</sup> However, from the content of the regulation it became clear that not all elements of its aim had received equal weight. The Commission felt that it was obliged, first and foremost, to the ACP countries under Article 168(1) of the Fourth Lomé Convention and its Protocol No. 5 which guaranteed that "no ACP State shall be placed, as regards access to its traditional markets and its advantages on these markets, in a less favourable situation than in the past or at present". It thought it could attain the regulation's objective through further preferential treatment of EC- and traditional ACP-bananas and imposition of quantitative restrictions on TC-bananas and non-traditional ACP-bananas. Thus, the Commission devised a system of aid for the Community's own producers<sup>27</sup> while traditional ACP-imports were kept duty-free, thereby better shielding both from third country competition. The existing import duty for TC-bananas of 20% *ad valorem* would be retained, but in addition a basic quota of 2 million tonnes per year was proposed for TC-bananas and

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<sup>22</sup> See B. Borrell and M.-C. Yang, *EC Bananarama 1992*, World Bank Working Papers Series 523, Washington D.C. (1990), at cover page.

<sup>23</sup> See Borrell and Yang, *supra* note 22, at 19.

<sup>24</sup> See Borrell and Yang, *supra* note 22, at cover page.

<sup>25</sup> COM (92) 359 final.

<sup>26</sup> See the preamble to the proposal (third recital).

<sup>27</sup> Article 12(2) of the proposal.

non-traditional ACP-bananas (plus an additional quota if a forecast supply balance would show an increase in consumption).<sup>28</sup> The quota system was to operate on the basis of an allocation of import licenses. In order to stimulate the marketing of EC- and traditional ACP-bananas even further, the Commission proposed a so-called system of importers' partnership. Under this scheme, only 70% of the quota would be allocated to the importers of TC-bananas; the remaining 30% would generally be reserved for those importers who would commit themselves to market EC- and traditional ACP-bananas.

As noted above, the objective of the regulation was, *inter alia*, to establish a common banana regime compatible with the Community's various international obligations. Although perhaps compatible with its obligations under the Lomé Convention, the regime was clearly inconsistent with GATT law. The Commission frankly acknowledged this fact and suggested that the Community should apply for a waiver under Article XXV(5) GATT (1947) in order to bring its future regime in conformity with its obligations under GATT.<sup>29</sup> At the 17th ACP-EC Council of Ministers, which was held in Jamaica on 21 and 22 May 1992, the ACP Group "expressed its gratitude" for the Commission's favourable proposal, and the ACP spokesperson on bananas, Eugenia Charles, Dominica's Prime Minister, congratulated the Commission on its "bold move".<sup>30</sup> The third countries, on the other hand, were not amused. In the so-called 'Santa Fe Declaration' of 18 August 1992, Colombia, Costa Rica, Ecuador, Guatemala, Honduras, Nicaragua, Panama and Venezuela condemned the proposal, which they deemed "unacceptable".<sup>31</sup> Meanwhile, five countries, Colombia, Costa Rica, Guatemala, Nicaragua and Venezuela had already requested GATT Article XXII consultations with the Community in regard to the proposed regime.<sup>32</sup> These countries also called on the Director-General of GATT to use his good offices in order to resolve the dispute.<sup>33</sup> Criticism did not come only from outside the Community. Although the European Parliament and the

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<sup>28</sup> Article 17(1) of the proposal.

<sup>29</sup> See part IV (point 45 and 46) of the Explanatory Memorandum.

<sup>30</sup> See *The Courier* 134 (July-August 1992), pp. 8-9.

<sup>31</sup> See *Agence Europe* 5801 (27 Augustus 1992), p. 8.

<sup>32</sup> See *GATT Focus* 92 (July 1992), p. 4.

<sup>33</sup> See *GATT Focus* 94 (October 1992), pp. 3-4.

Economic and Social Committee issued favourable opinions regarding the proposal,<sup>34</sup> several ECOSOC members pointed out that the proposed regime was incompatible with Community law, in particular competition law, with the new approach to agricultural policy, and with the commitments made in the framework of the Uruguay Round.<sup>35</sup> As was to be expected, debate within the Council of Ministers reflected the divergent interests of the different Member States. Germany very much opposed the proposed regime and was supported by Denmark. At one point, the German minister, Jürgen Molleman even considered that the proposed regime could have a negative effect on the ratification process by Germany of the Treaty on European Union.<sup>36</sup>

Although it was recognized that the regulation consequently could be adopted only on the basis of a compromise, the draft text presented at the meeting of the Agricultural Council in December 1992 did not alter the essence of the proposal and therefore was not acceptable to both Germany and Denmark. Nonetheless, a final text, which did not change much, was adopted in February 1993 despite fierce opposition from the German minister, now supported by not only Denmark but also his Belgian and Dutch colleagues. A late change in direction by Denmark, however, permitted adoption by qualified majority.<sup>37</sup> EC Commissioner for Agriculture and Rural Development, René Steichen, praised Denmark for having the courage to take the difficult decision to change its December vote in the interests of the Community and condemned the countries which, by their constant dealings, had managed to jeopardize the Council's credibility and good functioning.<sup>38</sup>

### 3. The Council Regulation

As noted above, the regulation did not alter the essence of the proposal although a modest attempt was made to make it slightly more acceptable to the 'revolting' Member States. The

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<sup>34</sup> European Parliament (Doc. A3-0410/92); Economic and Social Committee, Opinion on the proposal for a Council Regulation on the common organization of the market in bananas (93/c 19/26), OJ C 19/99 (25 January 1993).

<sup>35</sup> See OJ C 19/102 (25 January 1993).

<sup>36</sup> See *Agence Europe* 5830 (7 October 1992), p. 10.

<sup>37</sup> See *Agence Europe* 5920 (15/16 February 1993), p. 9.

<sup>38</sup> *Ibid.*

main difference between the proposal and the regulation was the introduction of a tariff quota instead of plain quantitative restrictions. The tariff quota also allows for the importation of 2 million tonnes per year of bananas originating in third countries or ACP-countries which are not traditional suppliers to the Community.<sup>39</sup> Within the tariff quota, the importation of non-traditional ACP-bananas is duty-free while TC-bananas are subject to a levy of 100 ECU per tonne, which corresponds to the 20% CCT rate.<sup>40</sup> Outside the tariff quota, however, importation of non-traditional ACP- and TC-bananas is not prohibited but subject to duties of 750 and 850 ECU per tonne, respectively.<sup>41</sup> The regulation also allows for an increase of the quota volume on the basis of a forecast supply balance.<sup>42</sup> The system of importers' partnership remained virtually the same. In the regulation, however, a clear distinction is made between, on the one hand, traders who in the past have marketed TC- and non-traditional ACP-bananas and, on the other hand, traders who have marketed EC- and/or traditional ACP-bananas. The former traders are allocated 66.5% of the tariff quota while the latter receive 30%. The remaining percentage, 3.5%, is reserved for new traders.<sup>43</sup> The introduction of a tariff quota instead of quantitative restrictions was reason for the Commission to revoke its statement that the import regime was inconsistent with the rules of GATT. In the view of the lawyers of the Commission, the regulation only provided for the modification of tariff bindings and thus stayed "within the future GATT tariff orthodoxy".<sup>44</sup> However, the Commission must have suspected that the regulation may have been incompatible with other points of GATT law since, at the very least, the violation of Articles II and III was obvious.

#### *D. The Council Regulation's Consequences*

The purpose of the regulation and, in particular, of the allocation of 30% of the tariff quota for TC-bananas to traders in EC- and traditional ACP-bananas, was to make economic life

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<sup>39</sup> Article 18(1) of Council Regulation 404/93.

<sup>40</sup> Article 18(1) and the preamble to Council Regulation 404/93.

<sup>41</sup> Article 18(2) of Council Regulation 404/93. A 850 ECU per ton duty corresponds to a 170% *ad valorem* tariff; see Eeckhout, *supra* note 21, at 233/234.

<sup>42</sup> Article 16 and 18(1) of Council Regulation 404/93.

<sup>43</sup> Article 19(1) of Council Regulation 404/93.

<sup>44</sup> See *Agence Europe* 5920 (15/16 February 1993), p. 10.

somewhat easier for this group of traders. The grant of the right to obtain licenses to import TC-bananas gave them a clear economic advantage, whether they would choose to import these bananas themselves or would prefer to sell the licenses and make a profit on the sale. In practice considerable trade in licenses was taking place, creating a kind of 'black market' in these licenses.<sup>45</sup> Licenses were sold at about 450 ECU per tonne.<sup>46</sup> Traders in TC-bananas were thus given the opportunity to buy back their own market shares from those traders who had been awarded 30% of the tariff quota. Furthermore, TC-traders had the opportunity to buy EC- and ACP-bananas in case they needed more bananas. In fact, serious attempts were made by these traders to buy EC- and ACP-bananas, but these purchases appeared virtually impossible. Naturally, the regulation had promoted the marketing of EC- and ACP-bananas to such an extent that traders in these bananas were very eager to preserve the existing relations with their producers, and *vice versa*.<sup>47</sup> The Commission, however, refused to understand this basic point as appears from an interview by *Eurofruit Magazine* with the DG VI Director of Agriculture, Alexander Tilgenkamp. In the view of Tilgenkamp, trading in ACP-bananas would be a "matter of personal choice" for a German importer. And, moreover: "The importer is not obliged to market ACP bananas. He can always limit himself to marketing dollar bananas, either within the framework of the licenses granted or, if he prefers, even above the import quota". However, Tilgenkamp did acknowledge that there was a problem for the importer "should he want to maintain his market share and his profits".<sup>48</sup> Some importers might indeed like to do just that.

The immediate consequence and most objectionable aspect of the regulation was that, by a sheer act of Community intervention, market shares and thus profit potential were transferred from traders in TC-bananas to traders in EC- and traditional ACP-bananas. In fact, market shares held by traders in TC-bananas were expropriated - without any, let alone fair compensation - to the benefit of their competitors. The economic damage for TC-banana importers, in particular, was enormous. The total share of TC-banana importation by German importers, for example, was reduced from about 1.35 million tonnes to 0.7 million tonnes, or about 36% of the new tariff quota, while importers in such Member States as France, Spain

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<sup>45</sup> See *Eurofruit Magazine* (October 1993), p. 17.

<sup>46</sup> According to the Advocate General in Case C-280/93 (paragraph 79).

<sup>47</sup> According to the Advocate General in Case C-280/93 (paragraph 80).

<sup>48</sup> See *Eurofruit Magazine* (October 1993), p. 15.



and the United Kingdom, most of whom never had imported one single TC-banana, were donated 8 to 10% of the tariff quota for these bananas.<sup>49</sup> In the northern Member States, the regulation thus caused serious disturbances in patterns of trade, including rising prices, falling turnover, and redundancies in both the banana and the transport industry. The German importers already had been forced to discontinue 20% of their wholesale operations and to lay off 10% of their workforce.<sup>50</sup> A new World Bank study concluded that the common banana regime was at least as inefficient as the previous national market arrangements.<sup>51</sup> According to a study by Read, the regime was both inefficient and inequitable and represented only a second-best policy. Read concluded that: "The analysis of the EC's new import regime for bananas therefore suggests that, in terms of efficiency and equity, it is a second-best policy which can be argued to be actually inferior to the pre-SEM arrangements".<sup>52</sup>

### *E. The Banana Dispute before the GATT Council*

#### 1. The First GATT Panel Report

Already before the banana-exporting countries Costa Rica, Columbia, Guatemala, Nicaragua and Venezuela had asked the GATT Council to establish a panel in order to examine whether the common regime was compatible with GATT law, an earlier complaint by these countries had resulted in a panel investigation.<sup>53</sup> This earlier complaint contested the consistency with GATT of the various national market organizations. The complainants argued, firstly, that the restrictions or prohibitions maintained by France, Italy, Portugal, Spain and the United

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<sup>49</sup> According to the German government in Case C-280/93; see the Opinion of the Advocate General (paragraph 73).

<sup>50</sup> According to the court of reference in Case C-465/93; see the Opinion of the Advocate General in Case C-280/93 (paragraph 83).

<sup>51</sup> See B. Borrell and M.-C. Yang, *EC Bananarama 1992: The Sequel*, World Bank Working Papers Series, Washington D.C. (1992).

<sup>52</sup> See R. Read, 'The EC Internal Banana Market: The Issues and the Dilemma', 17 *The World Economy* 219 (1994), p. 233. SEM is an abbreviation of Single European Market.

<sup>53</sup> The panel was established on 10 February 1993 under the expedited procedures of the 1966 Decision on disputes involving developing countries; see *GATT Focus* 100 (July 1993), pp. 2-4. The Panel submitted its report to the parties to the dispute on 19 May 1993.

Kingdom affecting the import of bananas were incompatible with Article XI:1 GATT prohibiting quantitative restrictions.<sup>54</sup> According to the European Community, however, these restrictive measures, even if incompatible with Article XI:1, were covered, at least in part, by Article XI:2(c)(i), by existing legislation clauses contained in the protocols by which these countries had become contracting parties, and by the provisions of Article XXIV.<sup>55</sup> Secondly, the complaining parties submitted that the tariff preferences granted by certain EC Member States were inconsistent with Article I concerning most-favoured-nation treatment.<sup>56</sup> In the view of the Community, however, these tariff preferences, although perhaps inconsistent with Article I, were justified by Article XXIV taken in conjunction with Part IV.<sup>57</sup>

On the first point, the panel concluded that the quantitative restrictions maintained by France, Italy, Portugal, Spain and the United Kingdom were incompatible with Article XI:1, and could not be justified by Article XI:2(c)(i), Article XXIV, or the grandfather clauses in the Protocol of Provisional Application or the accession protocols of the Member States concerned.<sup>58</sup> On the second point it held that the tariff preferences accorded to ACP States in the framework of the Lomé Convention were incompatible with Article I and could not be justified by invocation of Article XXIV. Such preferences were therefore prohibited and could be maintained only if a waiver would be granted.<sup>59</sup> The panelists firmly rejected the EC's argument that the quantitative restrictions were at least partly justified by Article XI:2 which allows for such restrictions on agricultural products if they are necessary to the enforcement of governmental measures directed at restricting the quantities of the like domestic product permitted to be marketed or produced. According to the panel, the necessary conditions had not been met.<sup>60</sup> The EC's claim that the measures were covered by grandfather clauses also was refuted by the panel. The panel found that the measures in

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<sup>54</sup> *EEC - Member States' Import Regimes for Bananas*, DS32/R, 3 June 1993, not yet adopted (hereinafter: First Panel Report), paragraph 48.

<sup>55</sup> See First Panel Report, paragraph 56.

<sup>56</sup> See First Panel Report, paragraph 207ff.

<sup>57</sup> See First Panel Report, paragraphs 216ff.

<sup>58</sup> See First Panel Report, paragraphs 326 and 374.

<sup>59</sup> See First Panel Report, paragraphs 364ff and 374.

<sup>60</sup> See First Panel Report, paragraph 341.

question, for the most part dating from the 1930s, were not mandatory in nature, which is a necessary condition.<sup>61</sup> The panel finally noted that the tariff preferences accorded by the Community to imports of bananas from ACP States were incompatible with Article I and could not be justified under Article XXIV. The requirements of Article XXIV could not be modified by the provisions of Part IV.<sup>62</sup>

## 2. The Second GATT Panel Report

In February 1993 Columbia, Costa Rica, Guatemala, Nicaragua and Venezuela entered into consultations with the European Community regarding Regulation 404/93, pursuant to Article XXII:1 of GATT. Since these negotiations did not lead to a mutually satisfactory solution, the complaining countries requested the establishment of a panel in accordance with Article XXIII:1. The main arguments of the parties and main findings of the panel are set out below.

### 2.1 Arguments of the Parties

#### 2.1.1 Article II

In the opinion of the complaining parties, the new tariff rates which the regulation introduced were inconsistent with the Community's tariff binding of 20% *ad valorem*. The rate of 100 ECU per tonne for bananas imported within the tariff quota was equivalent to at least 23% *ad valorem*, and the rate of 850 ECU per tonne for bananas imported outside the tariff quota was equivalent to at least 160% *ad valorem*.<sup>63</sup> In the view of the Community, 100 ECU per tonne corresponded to less than 20% *ad valorem* duty when based on the correct representative period 1989-1991. The complainants had based their calculations on the trade figures for 1992 but these figures were artificially inflated. Furthermore, the 850 ECU per

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<sup>61</sup> See First Panel Report, paragraphs 356 and 357.

<sup>62</sup> See First Panel Report, paragraphs 372 and 375. The arguments and findings regarding the GATT-consistency of the tariff preferences granted in the framework of the Lomé Convention will be discussed in more detail below.

<sup>63</sup> EEC - Import Regime for Bananas, DS38/R, 11 February 1994, paragraphs 20ff and 132, not yet adopted (hereinafter: Second Panel Report); see also Guatemala Rebuttal Submission, p. 22.

tonne rate could not have any actual or potential effects on the export opportunities of the complainants, because they simply did not export enough bananas to fill the tariff quota. At any rate, since Article XXVIII:5 compensation negotiations had been initiated, the issue of violation of Article II had become moot and the panel could not review it.<sup>64</sup>

### 2.1.2 Article XI

The complaining parties argued that the tariff quota was inconsistent with Article XI:1 because the tariff quota, the high over-quota tariff rate and the non-automatic licenses within the tariff quota had to be considered quantitative restrictions within the meaning of that provision. In their view, it was established GATT practice that the prohibition of Article XI:1 included measures that were not quotas *strictu sensu*, such as non-automatic licenses. The high over-quota tariff made it impossible to import bananas in excess of 2 million tonnes and thus operated as a quantitative restriction.<sup>65</sup> According to the Community, neither the tariff quota with its high over-quota rate nor the licensing scheme could be considered inconsistent with Article XI. The drafting history of Article XI confirmed that this provision did not prohibit such use of a tariff quota. Moreover, the tariff quota would not have the actual trade impact as suggested by the complaining parties. The licensing scheme was in conformity with the provisions of the Agreement on Import Licensing Procedures and consistent with established GATT jurisprudence.<sup>66</sup>

### 2.1.3 Articles III and I

In the view of the complainants, the method of allocating the import licenses was inconsistent with Article III:4. The reservation of 30% of the licenses for operators who marketed EC- or traditional ACP-bananas gave operators an incentive to purchase these bananas. In fact, operators were compelled to purchase them in order to increase their market share. Therefore, conditions of competition between EC- and traditional ACP-bananas, on the one

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<sup>64</sup> See Second Panel Report, paragraphs 23ff and 132; see also EC Written Submissions, 7 October 1993 (paragraphs 53-57).

<sup>65</sup> See Second Panel Report, paragraphs 53ff and 137; see also Guatemala Rebuttal Submission, p. 28ff.

<sup>66</sup> See Second Panel Report, paragraphs 55ff and 137; see also EC Second Oral Pleading Notes of 16 November 1993, p. 23.

hand, and TC- and non-traditional ACP-bananas, on the other, were adversely affected. Furthermore, the differential tariff rates clearly violated Article I:1.<sup>67</sup> The Community considered that its method of allocating the licenses did not actually distort competitive conditions. Competition for EC- and traditional ACP-bananas would drive up the price thus making them more difficult to sell. Moreover, the allocation scheme was not capable of preventing full utilization of the tariff quota. Therefore, there was no modification of competitive conditions. The Community did not contest, however, that the differential tariff rates were incompatible with Article I:1.<sup>68</sup>

#### 2.1.4 Articles I, XXIV and Part IV

According to the Community the tariff preferences accorded to ACP-bananas, even if inconsistent with Article I:1, could be justified under Article XXIV read in the light of Part IV of the General Agreement, in particular Article XXXVI:8(b) which provides that "the developed contracting parties do not expect reciprocity for commitments made by them in trade negotiations to reduce or remove tariffs and other barriers to the trade of less-developed contracting parties". The Lomé Convention had established a free trade area in terms of Article XXIV between the Community and the ACP States and therefore the tariff preferences were permitted.<sup>69</sup> The complaining parties countered that the Lomé Convention did not meet the requirements of a free trade area as set out in Article XXIV. Neither the letter nor the spirit of the provisions of Part IV could lead to an interpretation enabling it to be used to replace the obligation of the most-favoured-nation clause of Article I or the reciprocity requirement of Article XXIV.<sup>70</sup>

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<sup>67</sup> See Second Panel Report, paragraphs 78ff and 143.

<sup>68</sup> See Second Panel Report, paragraphs 80ff and 143.

<sup>69</sup> See Second Panel Report, paragraphs 32ff and 154ff; *see also* EC Second Oral Pleading Notes, p. 9ff.

<sup>70</sup> See Second Panel Report, paragraphs 29ff and 154ff; *see also* Guatemala Rebuttal Submissions, p. 9ff.

## 2.2. Previous Case-Law and Practice

### 2.2.1 Article II

Under Article II(1)(a), each contracting party is obliged to "accord to the commerce of the other contracting parties treatment no less favorable than that provided for in the appropriate Part of the appropriate Schedule annexed to this Agreement". Transparent tariff bindings offer security and predictability which are of fundamental importance to the world trading system. Previous panel rulings have usually emphasized this basic point. In the *Newsprint* case, for example, the panel referred to "the fundamental importance of the security and predictability of GATT tariff bindings, a principle which constitutes a central obligation in the system of the General Agreement".<sup>71</sup> Tariff bindings also give rise to legitimate expectations. Traders base their export and import plans and investment decisions on such bindings. GATT panels and Working Parties generally have concluded that any change in the tariff schedule of a contracting party is, in principle, prohibited and must be renegotiated under Article XXVIII beforehand.<sup>72</sup> It also is well-established that the objective of the provisions of GATT is not just to protect current trade flows but also to protect possible future trade.<sup>73</sup>

### 2.2.2 Article XI

Article XI:1 provides, *inter alia*, that "no prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licenses or other measures, shall be instituted or maintained by any contracting party on the importation of any product of the territory of any other contracting party ...". Quantitative restrictions are less transparent and more trade-distorting than tariffs and therefore must be banned.

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<sup>71</sup> See Panel on *Newsprint*, BISD 31S/114 (paragraph 52), report adopted on 20 November 1984.

<sup>72</sup> See, e.g., *Increase of Import Duties on Products Included in Schedule XXV*, BISD 1S/51 (paragraph 2), report adopted on 3 November 1952. In the *Newsprint* case, it was noted that "under long-standing GATT practice, even purely formal changes in the tariff schedule of a contracting party (...) have been considered to require negotiations"; see paragraph 50. See also J.H. Jackson, *World Trade and the Law of GATT* (1969), p. 215.

<sup>73</sup> See, e.g., *European Economic Community - Payments and Subsidies to Processors and Producers of Oilseeds and Related Animal-Feed Proteins*, BISD 37S/86 (paragraph 150), report adopted on 25 January 1990.

Previous case-law has established that, generally speaking, absolute prohibitions ought to be interpreted broadly and exceptions to the rule interpreted narrowly.<sup>74</sup> In addition, there is authority for the view that measures which are intended to work as quantitative restrictions should be considered quantitative restrictions.<sup>75</sup> The tariff quota indeed was intended to operate as such. According to recital 16 of Regulation 404/93, imports outside the quota "must be subject to sufficiently high rates of duty to ensure that Community production and traditional ACP quantities are disposed of in acceptable conditions". On the other hand, however, it also could be maintained that Article XI does not cover tariff quotas. Article XIII on the non-discriminatory administration of quantitative restrictions explicitly mentions tariff quotas. It seems clear from paragraph 5 that there is a distinction between 'prohibitions and restrictions' and tariff quotas. In practice, the schedules of concessions of many contracting parties provide for tariff quotas. Finally, as regards the references to the significant trade impact of the tariff quota and its high over-quota rate, it seems to be established case-law that the actual impact of a particular measure on trade flows is irrelevant to the determination of whether this measure in fact constitutes a quantitative restriction.<sup>76</sup>

### 2.2.3 Articles III and I

Taken together, Articles I and III make up the non-discrimination principle of GATT, and as such they form the cornerstone of the WTO legal system. Under Article I:1 advantages or privileges granted by any contracting party to any product of another country shall be accorded immediately and unconditionally to the like product of all other contracting parties. Article III:1 provides that internal regulations may not be applied to imported or domestic products so as to afford protection to domestic production. In view of their importance, the obligations under these provisions have generally been interpreted broadly.<sup>77</sup> According to

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<sup>74</sup> See, e.g., *Canada - Import Restrictions on Ice Cream and Yoghurt*, BISD 36S/68 (paragraph 59), report adopted on 5 December 1989.

<sup>75</sup> See, e.g., *Japan - Trade in Semi-Conductors*, BISD 35S/116 (paragraph 117), report adopted on 4 May 1988; and *EEC - Programme of Minimum Import Prices, Licenses and Surety Deposits for Certain Processed Fruits and Vegetables*, BISD 25S/68 (paragraph 4.14), report adopted on 18 October 1978.

<sup>76</sup> See, e.g., *Japanese Measures on Imports of Leather*, BISD 31S/94 (paragraphs 47-48), report adopted on 15/16 May 1984; see also *EEC - Payments and Subsidies to Processors and Producers of Oilseeds and Related Animal-Feed Proteins*, BISD 37S/86 (paragraph 150), report adopted on 25 January 1990.

<sup>77</sup> See, e.g., *Italian Discrimination Against Imported Agricultural Machinery*, BISD 7S/60, report adopted on 23 October 1958; *Canada - Administration of the Foreign Investment Review Act*, BISD 30S/140, report adopted on 7 February 1984.

the panel in *United States - Section 337 of the Tariff Act of 1930*, for example, it does not have to be established that a measure actually results in less favourable treatment, but only that a measure can have such discriminatory results.<sup>78</sup> In one of the classics of GATT jurisprudence, *Brazilian Internal Taxes*, the panel noted that, in determining whether effective equality of opportunities for imported products under Article III:4 was accorded, the actual trade impact of the measure was irrelevant.<sup>79</sup>

#### 2.2.4 Articles I, XXIV and Part IV

Article XXIV:8(b) gives the definition of a free trade area: "A free-trade area shall be understood to mean a group of two or more customs territories in which the duties and other restrictive regulations of commerce (...) are eliminated on substantially all the trade between the constituent territories in products originating in such territories". According to the Note to Article XXXVI:8, which allows for non-reciprocity, "this paragraph would apply in the event of action under Section A of Article XVIII, Article XXVIII, Article XXVIIIbis, ... Article XXXIII, or any other procedure under this Agreement". The Note seems to make clear that Article XXXVI:8 only applies to procedures. Article XXIV is not referred to in the Note, participants in the negotiations of a free trade area do not derive their negotiating status from the General Agreement, and they are not required to follow procedures set out under the General Agreement to conclude the free trade agreement. Moreover, in *Norway - Restrictions on Imports of Certain Textile Products*, the panel ruled that the provisions of Part IV cannot prevail over obligations under other parts of the General Agreement.<sup>80</sup> The proper legal basis for non-reciprocal trade agreements between developed and developing contracting parties seems to be the Enabling Clause of 1979.<sup>81</sup>

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<sup>78</sup> See *United States - Section 337 of the Tariff Act of 1930*, BISD 36S/345, report adopted on 7 November 1989.

<sup>79</sup> BISD II/181, Report of the Working Party adopted on 30 June 1949; in particular paragraph 16 where it is stated that the obligations of Article III:4 were "equally applicable whether imports from other contracting parties were substantial, small or non-existent". Confirmed in, e.g., *United States - Taxes on Petroleum and Certain Imported Substances*, BISD 34S/136 (paragraph 5.1.9.), report adopted on 17 June 1987; and *United States - Measures Affecting Alcoholic and Malt Beverages*, DS23/R (paragraph 5.65), report adopted on 19 June 1992.

<sup>80</sup> BISD 27S/119 (paragraph 15), report adopted on 18 June 1980.

<sup>81</sup> Decision of 28 November 1979 on 'Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries', L/4903.



### 2.3. The Panel Ruling

#### 2.3.1 Article II

The Panel concluded that the Community had not submitted any evidence that the 100 ECU per tonne specific tariff could never exceed 20% *ad valorem*. Since the 850 ECU per tonne tariff undoubtedly was higher than 20% *ad valorem*, both new specific tariffs had resulted in a levying of a duty on imports whose *ad valorem* equivalent was, either actually or potentially, higher than 20% *ad valorem*.<sup>82</sup> The Community's argument that previous panels never had addressed the issue of a change from *ad valorem* to specific, but only the other way around, was refuted by the panel. Referring to the *Newsprint* case, the panel held that *any* change that could adversely affect the value of concessions required renegotiations.<sup>83</sup> Moreover, in determining whether the new situation offered treatment no less favourable than that provided for in the Schedule, the Panel "had to take into account not only the actual circumstances of that measure for present imports but also its effects on possible future imports. This followed from the principle recognized by many previous panels that the provisions of the General Agreement serve not only to protect actual trade flows but also to create predictability for future trade".<sup>84</sup> The Panel further noted that its terms of reference permitted it to fully review the issue and that, according to Article XXVIII(5), a mere notification of the intention to modify a tariff binding does not by itself change the legal status of such binding. Under Article XXVIII(1), the actual modification or withdrawal may occur only *after* negotiation with the other relevant contracting parties. The Panel therefore was required to examine the compatibility of the new specific tariffs with Article II notwithstanding the notification.<sup>85</sup>

#### 2.3.2 Article XI

The Panel considered that tariff quotas never had been found to be restrictions as such within

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<sup>82</sup> See Second Panel Report, paragraph 134.

<sup>83</sup> See Second Panel Report, paragraph 135.

<sup>84</sup> *Ibid.*

<sup>85</sup> See Second Panel Report, paragraph 133.

the meaning of Article XI:1.<sup>86</sup> Measures which permit the import of bananas under one tariff up to a certain amount, and allow additional amounts only at a higher rate, therefore are not inconsistent as such with Article XI:1. The high over-quota rate is consistent with Article XI:1. The Panel noted that it never had been established in GATT practice that high tariff rates constitute quantitative restrictions merely because of their adverse trade effects. The mere fact that the tariff level may be so high as to render imports unprofitable does not make the tariff a quantitative restriction.<sup>87</sup> The scheme of non-automatic licensing is permitted under Article XI:1 since it does not alter the nature of the tariff quota.<sup>88</sup>

### 2.3.3 Articles III and I

The Panel noted that in the absence of provisions in the General Agreement specifically regulating the allocation of tariff quota licenses, contracting parties making use of such a scheme were required to observe the generally applicable provisions prescribing treatment of imported products no less favourable than that accorded to like domestic products and most-favoured-nation treatment, such as Articles III:4 and I:1.<sup>89</sup> A requirement to buy *domestic* products in order to obtain the right to import a product at a lower rate of duty under a tariff quota is a requirement affecting the purchase of a product within the meaning of Article III:4. A preferred allocation of licenses to operators who buy bananas from ACP States violates the most-favoured-nation rule of Article I:1.<sup>90</sup> Referring to *Brazilian Internal Taxes*,<sup>91</sup> the panel declared that, in judging whether effective equality of opportunities for imported products under Article III:4 was accorded, the actual impact on trade of the measure in question was irrelevant. Likewise, actual trade flows were irrelevant to determine conformity with Article I:1.<sup>92</sup> Moreover, the differential tariff rates were inconsistent with Article I:1 since the preferential treatment by the Community of ACP-bananas was not

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<sup>86</sup> See Second Panel Report, paragraph 138.

<sup>87</sup> See Second Panel Report, paragraph 139.

<sup>88</sup> See Second Panel Report, paragraph 140.

<sup>89</sup> See Second Panel Report, paragraph 145.

<sup>90</sup> See Second Panel Report, paragraphs 146 and 147.

<sup>91</sup> BISD II/181, Report of the Working Party adopted on 30 June 1949.

<sup>92</sup> See Second Panel Report, paragraphs 146 and 147.

granted, immediately and unconditionally, to the bananas originating in the territories of the complaining parties.<sup>93</sup>

#### 2.3.4 Articles I, XXIV and Part IV

The Panel first examined Article XXIV:8(b) and noted that the use of the plural in the phrases "between the constituent territories" and "originating in such territories" was unambiguous. It meant that only agreements providing for an obligation to liberalize the trade in products from *all* the constituent territories could be considered to establish a free trade area. Since the Lomé Convention does not provide for liberalization of trade in products originating in the Community, it cannot be considered a free trade area within the meaning of Article XXIV:8(b).<sup>94</sup> In view of the Community's argument relating to Part IV, in particular Article XXXVI:8, the Panel declared that it was thus bound to provide an answer to the question whether a limitation on the expectation of reciprocity in procedures under the General Agreement could be understood to include procedures leading to the formation of a non-reciprocal free trade area between developed and developing countries.<sup>95</sup> It decided that the wording and the rationale of the Note to Article XXXVI:8 suggested that the provision was not intended to apply to negotiations outside the procedural framework of the General Agreement, such as negotiations of a free trade area. The Lomé Convention was not a free trade area covered by Article XXIV and this provision therefore could not justify the inconsistency with Article I of the preferential treatment accorded to ACP-bananas.<sup>96</sup> The Panel thus agreed with the findings of the first Panel.

#### 2.3.5 Additional Comments

In addition to the Panel's findings, it could be argued that the banana regime was already in clear violation of the agreements regarding 'standstill' and 'rollback' of the Punta del Este Declaration which launched the Uruguay Round. At the commencement of the Round, the contracting parties agreed not to take any restrictive or distorting measures inconsistent with

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<sup>93</sup> See Second Panel Report, paragraph 155.

<sup>94</sup> See Second Panel Report, paragraph 159.

<sup>95</sup> See Second Panel Report, paragraph 160.

<sup>96</sup> See Second Panel Report, paragraphs 160-164.

the provisions of the General Agreement or the instruments negotiated within the framework of GATT or under its auspices and to phase out or bring into conformity with the General Agreement all such measures.<sup>97</sup> It also could be argued that the restrictive measures introduced by the regulation were in violation of the agreements negotiated within the framework of the Uruguay Round on the reduction of restrictions on trade in agricultural products in general, and tropical products in particular. The objective of the Uruguay Round was to achieve full liberalization in trade in tropical products and, according to the Mid-Term Review Agreements, tariffs on unprocessed products like fresh bananas were to be completely abolished. The banana regime clearly violates these agreements.<sup>98</sup>

The Community forcefully has opposed adoption of the two reports by the Council. Adoption, of course, would have had severe consequences, particularly in view of the findings of the two panels with respect to the ACP preferences. In December 1994, however, the Community obtained a waiver for the GATT-inconsistent Lomé Convention.<sup>99</sup> Meanwhile, intensive negotiations already had resulted in a partial *status quo*. On 29 March 1994, then Commissioner Rene Steichen announced the conclusion of a 'framework' agreement with four of the five Latin American countries involved in the dispute. Colombia, Costa Rica, Nicaragua and Venezuela agreed not to further pursue adoption of the second panel report by the Council, and not to initiate any dispute settlement procedures against the banana regime until 31 December 2002. In return, the tariff quota was increased from 2 million tonnes to 2.1 million tonnes for 1994 and 2.2 million tonnes for 1995. The in-quota duty was reduced from 100 ECU per tonne to 75 ECU per tonne on the full tariff quota.<sup>100</sup>

The negotiations, which nicely coincided with the tenth San José Conference on cooperation

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<sup>97</sup> See also M.J. Hahn and G. Schuster, 'Zum Verstoß von gemeinschaftlichem Sekundärrecht gegen das GATT: Die gemeinsame Marktorganisation für Bananen vor dem EuGH', 28 EuR 261 (1993), p. 269; also Eeckhout, *supra* note 21, at 238.

<sup>98</sup> In the Uruguay Round, the Community therefore had to exclude bananas from its offers; see Eeckhout, *supra* note 21, at 238.

<sup>99</sup> See GATT Focus 113 (December 1994), p. 3.

<sup>100</sup> See Announcement of the Commission, 29 March 1994, IP/94/265. See also Agence Europe 6201 (30 March 1994), p. 5. To take account of the enlargement of the European Community the tariff quota was later increased to a total of 2.5 million tonnes for the Community as a whole in 1995. See Commission Press Release of 4 April 1995, IP/95/338. As noted, the framework agreement was contested by Germany; see *supra* note 3.

of the Community with (and on its annual \$500 million aid for) Central America,<sup>101</sup> constituted a fine example of powerplay from the EC trade diplomats, powerplay which the Uruguay Round negotiations had hoped to eradicate, especially as against developing countries. Hopefully, it was the EC's final exhibition of this kind. The new Dispute Settlement Understanding (DSU) should make exertion of such diplomatic pressure more difficult, although in the international trade field the more ugly aspects of diplomacy probably will always remain present in one form or another. Fortunately, not all countries succumbed to the EC's pressure. In the summer of 1994, Guatemala, Ecuador, Honduras, Mexico and Panama again insisted on adoption of the two reports.<sup>102</sup> In October 1994, the United States Trade Representative, Mickey Kantor, announced his intent to investigate the EC common banana regime under the infamous Section 301 of the U.S. Trade Act. This announcement must be considered an equally reprehensible act, particularly in view of the fact that the parties to GATT explicitly have committed themselves, in the framework of the Uruguay Round, not to act unilaterally. This commitment is laid down in Paragraph 23 of the DSU. Kantor's statement led in turn to a strong reaction of the leaders of the Caricom-countries. They announced their intention to call on President Clinton and explain to him the need for preferential treatment.<sup>103</sup>

## *F. The Banana Dispute before the European Court of Justice*

### 1. The Arguments of the Parties

Before the European Court of Justice, Germany put forward several pleas in law in support of its application for a declaration of illegality. Only the arguments particularly relevant to the present topic, those pertaining to the infringement of specific fundamental rights of private traders in the European Community, are considered. The German government argued

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<sup>101</sup> See *Agence Europe* 6202 (31 March 1994), p. 5/6. The San José conferences bring together the foreign ministers of the EU and the European Commission, on the one hand, and six Central American countries (Costa Rica, El Salvador, Guatemala, Honduras, Nicaragua and Panama), on the other. Colombia, Mexico and Venezuela also participate, as so-called 'cooperation countries'.

<sup>102</sup> See *GATT Focus* 110 (August-September 1994), pp. 6-7.

<sup>103</sup> See *Caribbean & Central America Report* (15 December 1994), p. 1.

that, with respect to Community traders, the principles of non-discrimination and proportionality, the right to property and the freedom to pursue a trade, as well as the principle of undistorted competition, were violated by the legislation in question.<sup>104</sup> In the view of the German government, the subdivision of the tariff quota constituted an unjustified discrimination against traders in TC-bananas. The transfer of market shares from traders in TC-bananas to traders in EC- and traditional ACP-bananas entailed a violation of both the right to property and the freedom to pursue a trade. The allocation of the tariff quota and the prohibitive tariffs for imports outside the quota constituted an infringement of the principle of proportionality, since a less harmful instrument - a system of direct aid to producers - would have sufficed. The government further submitted that the way in which the tariff quota was allocated also conflicted with the Treaty rules on competition. This allocation would result in a freezing of the existing division of the market, since traders in EC- and traditional ACP-bananas would not be exposed to any competition and therefore would develop an anti-competitive attitude.

In response, the Council generally challenged the claim that traders in TC-bananas would lose any market shares. In its view, they would be able to maintain these shares. Not only did the regulation leave open the possibility of importing bananas outside the quota, but there also existed the possibility to buy import licenses from traders in EC- and traditional ACP-bananas who had received a 30% share of the quota. Moreover, traders in TC-bananas could always purchase EC- and traditional ACP-bananas to satisfy demand. The Council did not consider it necessary to contemplate whether the organization of the market entailed restrictions on competition. In the view of the Council, the Treaty rules on competition apply to agricultural policy only to the extent determined by the Council.<sup>105</sup>

## 2. The Opinion of the Advocate-General

The Council's assumption that traders in TC-bananas would not necessarily lose market shares could not really convince Advocate General Gulmann: "No great weight need be

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<sup>104</sup> See the Report of the Hearing (I used the German 'Sitzungsbericht'), pp. 15-17, and the Opinion of Advocate General Gulmann, in particular paragraphs 72-100. On this case see also G.M. Berrisch, 'Zum Bananen-Urteil des EuGH vom 5.10.1994 - Rs C-280/93, Deutschland ./ . Rat der Europäischen Union', EuR 461 (1994).

<sup>105</sup> *Ibid.*

attached to the Council's ideas on this point. It seems untenable to assume that operators will react in the way imagined by the Council. Moreover the Council acknowledged during the oral procedure that the rates of duty applied to imports outside the quota are prohibitive. It therefore appears more correct, as stated by the Commission, to assume that importation outside the tariff quota will take place only in exceptional circumstances and for rather short periods".<sup>106</sup> Moreover, if the Council were correct in claiming that significant importation could take place outside the tariff quota, the Advocate General argued, such imports would lead in any case to a very substantial increase in prices to the consumer, against which consumers would react.<sup>107</sup>

More generally, Advocate General Gulmann pointed to the difficult task the Community legislature had been faced with, the task of assessing the future effects of the regulation based on a series of factors which were difficult to foresee. Nonetheless, since the regulation used means which significantly interfered with existing trade patterns, the Advocate General noted, it was at least predictable that the regulation would lead to perceptible disturbances of trade.<sup>108</sup> In view of the basic objective, however, that the new market organization was to guarantee the marketing of the Community's own banana production and respect the Community's Lomé obligations, it had to be admitted that the common banana regime could not be implemented without far-reaching changes in existing market structures.<sup>109</sup> In such a case, the Advocate General pointed out, the Court of Justice should be cautious in fixing strict limits to the exercise of the legislature's discretion, even when it is known that the regulation was adopted against the will of certain Member States.<sup>110</sup> Particularly in his discussion of the German government's claim that the principle of proportionality had been infringed, the Advocate General showed his discontent with the existing situation: "In my view it is fairly clear that the efforts of the Council and the Commission in this matter to refute the German government's arguments regarding aid to producers could have been more convincing. It is still doubtful whether the Council could not have chosen other and less

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<sup>106</sup> Paragraph 77.

<sup>107</sup> Paragraph 78.

<sup>108</sup> Paragraph 83.

<sup>109</sup> Paragraph 84.

<sup>110</sup> Paragraph 85.

burdensome means both for consumers and trade for attaining the regulation's objective".<sup>111</sup> AG Gulmann did not think, however, that there was such manifest error in the choice of means for achieving its objectives as to make it possible for the Court of Justice to overrule that choice within the framework of its review of legality.<sup>112</sup> As regards possible infringement of the rules on competition, the Advocate General had to agree with the Council. It appears from Article 42 of the EC Treaty that the competition rules apply to trade in and production of agricultural products only to the extent determined by the Council. It is the Council that decides to what extent the competition rules are to be applied in the agricultural sector.<sup>113</sup>

It is indeed commonly held that the Community legislature enjoys a wide margin of discretion in assessing the means which are to be used to attain the objectives of legislation, especially when the envisaged legislation concerns the common agricultural policy. In *Fedesa*, for example, the Court held that "in matters concerning the common agricultural policy the Community legislature has a discretionary power which corresponds to the political responsibilities given to it by Articles 40 and 43 of the Treaty. Consequently the legality of a measure adopted in that sphere can be affected only if the measure is manifestly inappropriate having regard to the objective which the competent institution is seeking to pursue".<sup>114</sup> In such cases, judicial review by the Court of Justice is limited. However, limited judicial review also is a more general phenomenon of EC law. In *Wuidart*, for example, the Court declared, in general terms: "where the Community legislature is obliged, in connection with the adoption of rules, to assess their future effects, which cannot be accurately foreseen, its assessment is open to criticism only if it appears manifestly incorrect in the light of the information available to it at the time of the adoption of the rules in question".<sup>115</sup>

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<sup>111</sup> Paragraph 87.

<sup>112</sup> *Ibid.*

<sup>113</sup> Paragraph 101.

<sup>114</sup> Case C-331/88 *The Queen v. The Minister for Agriculture, Fisheries and Food and the Secretary of State for Health, ex parte: Fedesa and Others*, [1990] E.C.R. 4023 (paragraph 14). See also Joined Cases 279, 280, 285 and 286/84 *Walter Rau Lebensmittelwerke v. Commission*, [1987] E.C.R. 1069 (paragraph 34).

<sup>115</sup> Joined Cases 267 to 285/88 *Wuidart and Others v. Laiterie Coopérative Eupenoise*, [1990] E.C.R. I-435 (paragraph 14). See also Case 40/72 *Schroeder v. Germany*, [1973] E.C.R. 125 (paragraph 14); Joined Cases 9 and 11/71 *Compagnie d'Approvisionnement v. Commission*, [1972] E.C.R. 391 (paragraph 39).



### 3. The Ruling of the Court

#### 3.1 The Non-Discrimination Principle

The German government submitted that provisions of the regulation in question violated the principle of non-discrimination. The subdivision of the tariff quota in favour of traders in EC- and traditional ACP-bananas constituted a transfer of market shares by an act of the public authorities for which there could be no justification. In its decision on this point, the Court straight-forwardly applied its previous case-law. It held that, although the common organization of the market in bananas encompasses traders who are neither producers nor consumers, the general nature of the principle of non-discrimination implies that the prohibition of discrimination also applies to other categories of traders who are subject to a common market organization. To determine whether the principle of non-discrimination has been infringed, it must therefore be examined whether the regulation treats comparable situations differently.<sup>116</sup> It is true, the Court proceeded, that since the regulation came into force the two categories of traders have been affected differently by the adopted measures. Traders in TC-bananas have seen their import possibilities restricted, while for traders in EC- and traditional ACP-bananas these possibilities have been facilitated. Nonetheless, the complaint must be rejected as unfounded, since the difference in treatment appears to be inherent in the objective of integrating previously compartmentalized markets. The purpose of the regulation is to ensure the disposal of EC- and traditional ACP-bananas and this "entails the striking of a balance between the two categories of economic operators in question".<sup>117</sup>

#### 3.2 The Right to Property and the Freedom to Trade

The German government further argued that, by taking away their market shares, the regulation violated the right to property and the freedom to pursue a trade of TC-banana traders. The Court quickly dismissed the claim that there was an infringement of the right to property. In the view of the Court, the right to property of traders in TC-bananas could simply not be called into question by the introduction of the tariff quota and the rules for its

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<sup>116</sup> Paragraphs 68 and 69.

<sup>117</sup> Paragraph 74.

subdivision: "No economic operator can claim a right to property in a market share which he held at a time before the establishment of a common organization of a market, since such a market share constitutes only a momentary economic position exposed to the risks of changing circumstances".<sup>118</sup> A trader can never claim an acquired right or even a legitimate expectation that an existing situation which is capable of being changed by decisions of the Community institutions within the borders of their discretionary powers will be maintained, particularly if the existing situation is inconsistent with the rules of the common market.<sup>119</sup> The argument that provisions of the regulation violated the freedom to pursue a trade received little more analysis. The introduction of the tariff quota and the rules for its subdivision do alter the competitive situation of the traders in TC-bananas, the Court stated, and it therefore must be examined whether the restrictions introduced by the regulation correspond to objectives of public interest and do not impair the very substance of the freedom to trade.<sup>120</sup>

According to the Court, the restriction of the right to import is inherent in the establishment of a common organization of the market that is designed to guarantee that the objectives of Article 39 of the Treaty can be attained and that the Community's international obligations under the Lomé Convention are respected. With reference in particular to the rules for subdivision, the Court held that the financial advantage accruing to traders in EC- and traditional ACP-bananas must be considered "a necessary consequence of the principle of transferability of licenses and must be assessed in the more general framework of all the measures adopted by the Council to ensure the disposal of Community and traditional ACP products. In that context it must be regarded as a means intended to contribute to the competitiveness of operators marketing Community and ACP bananas and to facilitate the integration of the Member States' markets".<sup>121</sup> In the view of the Court, the limits imposed on the freedom to pursue a trade therefore corresponded to objectives of public interest pursued by the Community and they did not impair the very substance of that right.<sup>122</sup>

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<sup>118</sup> Paragraph 79.

<sup>119</sup> Paragraph 80.

<sup>120</sup> Paragraph 81.

<sup>121</sup> Paragraph 86.

<sup>122</sup> Paragraph 87.

### 3.3 The Principle of Proportionality

The German government also claimed that the regulation breached the principle of proportionality. The objectives of supporting Community and ACP producers could be achieved by other, equally effective means which would not have had the harmful effects attached to the means which were being employed. The government mentioned in particular the possibility of introducing a system of direct aid. In its opinion, such a system could be financed by the current duty levied on TC-bananas and, if necessary, that duty could be raised. Under such a scheme, the price of bananas would not have to rise more than necessary in order to finance the aid. According to the Council and the Commission, however, the system would be disproportionately expensive and burdensome for the Community budget.<sup>123</sup> In the Court's view, its judicial review must be particularly limited in cases such as the establishment of a common organization of the market. In such cases, the Council has to reconcile conflicting interests and must select options within the context of policy choices which are its own responsibility.<sup>124</sup> In the present case, the Council had to reconcile the divergent interests of, on the one hand, banana-producing Member States concerned that their agricultural population living in economically less favoured regions would not be able to dispose of produce of vital importance for them and, on the other hand, TC-banana importing Member States concerned with ensuring that their consumers were supplied with bananas on the best possible terms.<sup>125</sup> Although other means for attaining the desired result were indeed conceivable, the Court admitted, it simply "cannot substitute its assessment for that of the Council as to the appropriateness or otherwise of the measures adopted by the Community legislature if those measures have not been proved to be manifestly inappropriate for achieving the objective pursued".<sup>126</sup> The German government has not demonstrated that the adopted measures were manifestly inappropriate or that the Council carried out a manifestly erroneous assessment of the information available to it at the time of adoption of the regulation.<sup>127</sup>

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<sup>123</sup> Paragraph 86.

<sup>124</sup> Paragraph 91.

<sup>125</sup> Paragraph 92.

<sup>126</sup> Paragraph 94.

<sup>127</sup> Paragraph 95.

### 3.4 The Principle of Undistorted Competition

In the view of the German government, the allocation of the tariff quota constituted an infringement of the competition rules of the Treaty. Article 3(f)<sup>128</sup> mentions as an objective of the Community the institution of a system ensuring that competition in the common market is not distorted. A redistribution of market shares and income by an act of the public authorities and a freezing of the market which will lead to the adoption of an anti-competitive attitude by the favoured traders, conflict with this objective. The Court, however, agreed with the Advocate General and reminded the German government that the institution of a system of undistorted competition is not the only objective mentioned in Article 3 of the Treaty. This article also provides for the establishment of a common agricultural policy. Since Article 42 recognizes the priority of the agricultural policy over the Treaty objectives in the field of competition and gives the Council the power to determine to what extent the competition rules are to be applied in the agricultural sector, the complaint of the German government that there has been a violation of the principle of undistorted competition had to be rejected.<sup>129</sup>

### *G. Conclusion*

The citizens of the Member States of the European Community may expect the EC legislator to always opt for legislation which serves the Community public interest. Often it is not crystal-clear which measure exactly would best serve the public interest and in those cases the legislator cannot be blamed for choosing a measure which later, with the benefit of hindsight, turns out to be a less effective measure than had been possible under the circumstances. When, however, at a given moment, one opts for a more or less radical policy change - because it is finally recognized that since the existing policy is highly inefficient and extremely costly the public interest is served by a radical reform - and confirms this policy change by concluding matching international agreements, than legislation which follows the old, opposite policy course and hence clearly conflicts with the new course is difficult to explain. Although it is not exactly clear which measure would best serve the public interest,

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<sup>128</sup> This is now Article 3(g) EC.

<sup>129</sup> Paragraphs 59-62.

it is beyond doubt that the chosen measure represents old and conflicts with new policy and is at least unlikely to serve that interest. The CAP reform followed by the agreements on agriculture negotiated and concluded within the framework of the Uruguay Round seemed to firmly establish the new, liberal or anti-protectionist, approach. Therefore, the protectionist banana regulation is just not logical and the average citizen will not understand why that regulation was adopted. Does anyone?

Two different explanations seem available to rationalize the adoption of Regulation 404/93. It is possible that the Commission has realized and accepted that the CAP was too inefficient. It genuinely supported the change, but simply finds it difficult too always resist the farm lobby. In that case, it does want to conform to the CAP reforms and the GATT agreements, but at times it finds itself forced to propose conflicting legislation in order to satisfy the lobby and, of course, the Agricultural Ministers of the more protectionist Member States in the Council. Also possible, however, is that the Commission (at least the responsible policy makers in DG VI) only has succumbed to the pressure of those who realized that a fundamental CAP reform was necessary in the Community public interest, but does not intend to seriously advocate the new policy. In that case, it will not feel hampered by the CAP reform nor by the GATT obligations, but it will continue to deliberately advance conflicting legislation. In both cases it is clear that specific sectoral interests are served instead of the public interest. The interests of inefficient farmers are served at the cost of consumers and taxpayers. In the latter case, however, the protectionist proposals will be more numerous and the proposal which led to the present banana regulation will prove to have been the first in a long line of destructive proposals. Unfortunately, it is more realistic to assume that indeed the Commission does not sincerely support the reforms and the GATT agreements and that the new CAP is only in appearance a more liberal policy than the previous one. This analysis is confirmed by Wyn Grant who notes that "the reader of the serious press might obtain the impression that the combined effect of the MacSharry reforms and the GATT agreements means that at last a comprehensive reform of the CAP has been achieved", however, "reforms of the CAP have introduced new instruments for the management of the policy, but they have not fundamentally changed the nature of the policy itself. The budgetary costs of the policy are far outweighed by the additional costs that consumers pay for produce which is priced above world market levels".<sup>130</sup> He concludes that "the CAP

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<sup>130</sup> See W. Grant, 'The limits of Common Agricultural Policy reform and the option of denationalization' *J. Eur. Pub. Pol'y* 1 (1995), p. 2.

continues to be characterized by total protection of EU farmers from outside market influences, maximum subsidies, and expensively managed markets for agricultural products".<sup>131</sup>

It must have been so obvious to all Commission economists and lawyers involved in drafting Regulation 404/93 that the means chosen to attain its objectives did not represent a first-best policy choice and did violate international obligations of the Community. It also must have crossed their minds that, after years of extremely difficult negotiations on agricultural policy within the framework of the Uruguay Round, they were about to jeopardize all that had been achieved and it must have occurred to them that they were about to endanger the opening up of agricultural markets to the benefit of Community exporters and about to hand arguments to important trading partners, such as the United States and Japan, to likewise ignore the new commitments. It is clear that the banana issue is not incidental. Time and again, legislation has been adopted in breach of GATT law; time and again EC consumers had to pick up the bill; time and again EC traders were unnecessarily hurt. The hope that all this might change after the CAP reforms and the successful conclusion of the Uruguay Round seems to have been in vain. Although the WTO Agreement only entered into force on 1 January 1995, and the banana regime therefore preceeded it, the regime was adopted in violation of firm commitments already made. There appears to be no guarantee whatsoever that the Community will act as a better WTO member than it did as a GATT contracting party. There is no guarantee that the promised opening up of agricultural markets to the benefit of the whole Community will actually take place. Should Member States therefore take the right into their own hands? In the summer of 1995 several German courts, in revolutionary decisions, permitted German importers to import bananas above the allowed quantity. They argued, thereby referring to Article 234 EC, that German membership in the WTO forced it to observe the rights of third countries, such as the Latin American banana-exporting countries, members of the WTO. The decisions were annulled on procedural grounds, but are likely to again revive the discussion.

Unfortunately, the Court of Justice does not seem to feel obliged to intervene on behalf of Community traders and consumers. The Court does not want to get involved or, rather, believes it cannot get involved. If the Commission and the Council feel they have to violate international obligations in order to serve the Community interest, the Court gives its

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<sup>131</sup> See Grant, *supra* note 130, at 16.

blessing. Of course, the Court finds itself in an extremely difficult position. On the one hand it is confronted with a Commission which does not seem to be convinced of the virtues of a more liberal CAP and a Council which tends to embrace "the policy of the most protectionist major member".<sup>132</sup> On the other hand, it is asked by traders to protect their rights and, implicitly, by the consumers of Europe to protect their purse. But, should traders and consumers have to count with and accept violations of international law when the Court itself has opted for a monist approach? Is it so logical that an importer who perhaps has built up his business over a period of decades, must always keep in mind that the institutions may deem it appropriate to take away part of his business and hand it over to his competitors? Should consumers always blindly accept price increases without any substantive justification? Is the supremacy of agricultural policy warranted in view of the declining economic importance of agricultural markets? Is not the supremacy clause of Article 42 EC perhaps a bit silly in view of the fact that the economy of the 1990s is so completely different from the economy of the 1950s when the provision was drafted? Does not the priority of agricultural policy hamper the European Community to a considerable degree in pursuing objectives of more economic importance?

There simply seem to be no limits to the discretionary powers of Commission and Council. All legislation is enacted automatically in the public interest. But why do not the Community institutions have to make plausible that legislation is enacted in the public interest? Should not there be at least a requirement to that effect when all available neutral studies have concluded that the proposed legislation is grossly inefficient and violates international obligations? Is not sacred respect for the discretionary powers of the institutions out of place, when these same institutions have promised their citizens that they will obey the rules of GATT, in the name of the public interest? The Court of Justice should at the very least require the EC legislator to give sufficient reasons for a sudden change of policy. *In concreto*, this means that there should be a presumption that a breach of higher GATT law has an adverse impact on the objective of serving the public interest, meaning that it is up to the Community legislator to rebut the charge and prove that the legislation is adopted in the public interest. The Community legislator cannot be allowed to act contrary to accepted economic theory and binding international law, while infringing fundamental human rights *en passant*. The individual rights of Community citizens must be protected against manifest

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<sup>132</sup> See L.A. Winters, 'The EC and Protection: The Political Economy', 38 Eur. Econ. Rev. 596 (1994), p. 602.

encroachments by Community legislation. But how far may the Court go in 'obstructing' Community legislation? It seems that in balancing public interest and individual rights in the field of foreign trade policy, the European Court of Justice faces a unique dilemma:

*The Court of Justice has proclaimed GATT law to form an integral part of European Community law with a higher rank than secondary Community law - The Court realizes that the Community and the Member States are WTO members because membership is beneficial to the Community - The Court knows that the Community institutions violate GATT law, at least occasionally - The Court has proclaimed fundamental human rights to form an integral part of the general principles of Community law with a higher rank than, at least, secondary Community law - The Court has promised that it will protect, under all circumstances, the substance of these rights - The Court realizes that the Community institutions violate fundamental human rights, at least occasionally - The Court may expect observance of GATT law to better protect both the public interest and fundamental rights - The Court nonetheless feels that it cannot intervene.*





## VIII

### *Individual Rights and Principles of GATT Law*

#### *A. Introduction*

Under Article 164 of the EC Treaty, it is the task of the Court of Justice to ensure that the law is observed in the interpretation and application of the Treaty. The Court therefore must review the legality of acts of Member States and the Community (or the failure of Community institutions to act) in direct actions before the Court of Justice. In addition, the Court must rule on the validity of acts of the Community and opine on the validity of acts of Member States in preliminary proceedings. This chapter will focus on the Court's review of the legality of Community acts. As the Court declared in *Les Verts*,<sup>1</sup> "the Treaty established a complete system of legal remedies and procedures designed to permit the Court of Justice to review the legality of measures adopted by the institutions".<sup>2</sup> Article 173 EC enumerates the five grounds of illegality: lack of competence, infringement of an essential procedural requirement, infringement of the Treaty, infringement of any rule of law relating to the application of the Treaty, and misuse of powers. Violation by the Community executive or legislature of binding international law, such as the rules of GATT, or breach of general principles of law, such as fundamental human rights, are both, in principle, considered 'infringement of any rule of law relating to the application of the Treaty'. These two different categories form part of the rules of law underlying the Treaty.<sup>3</sup>

The aim of this chapter is to provide arguments for the proposition that the Court of Justice should have interpreted the constitutional principles of Community law, as invoked by the German government in the *Banana* Case, in conformity with the corresponding legal principles of GATT. It will thereby concentrate on the 'credibility' issue, that is, the question whether the Court of Justice should not be afraid of losing its judicial credibility when it

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<sup>1</sup> Case 294/83 *Parti écologiste 'Les Verts' v. European Parliament*, [1986] E.C.R. 1339.

<sup>2</sup> [1986] E.C.R. 1339, at 1365 (paragraph 23).

<sup>3</sup> See H.G. Schermers and D. Waelbroeck, *Judicial Protection in the European Communities* (5th ed. 1992), pp. 217/218.

continues to refuse actual judicial protection to private traders for the sake of the Community public interest as construed by Commission and Council.<sup>4</sup> First, section B will give a brief overview of how individual rights are protected in Community law, while section C then takes a closer look at some of the specific constitutional principles: non-discrimination, the right to property, the freedom to trade, the principle of proportionality, the freedom of competition and the principles of legal certainty, legitimate expectations and estoppel. Subsequently, section D will consider the corresponding principles of GATT law. Finally, sections E and F will address the credibility issue. Section E will address the question of the Court's judicial credibility in safeguarding fundamental human rights, in particular when it is asked to strike down protective trade measures. Section F sets out to discover where, more generally, the boundaries of discretionary power lie for the Community institutions. It will be argued that in both cases the Court's interpretative guideline of 'Community Preference' usually settles the matter in favour of the Community, at least when it counts. Private traders just can't win.

### *B. The Protection of Individual Rights in Community Law*

The founding Treaties did not recognize fundamental human rights.<sup>5</sup> The constitution of the European Community lacks a 'bill of rights'.<sup>6</sup> The Court of Justice, however, has stated that legislative and administrative acts of the Community institutions will be declared unlawful if they violate fundamental rights which are recognized by the Court. It appears from the case-law of the Court of Justice that the Court protects fundamental rights on the basis that

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<sup>4</sup> Chapters IX and X will then address the issue in a wider sense. These chapters will look at the matter from an economic, utilitarian perspective and a rights-based, or 'justice' perspective, respectively.

<sup>5</sup> Unlike the founding Treaties, the Treaty on European Union does explicitly acknowledge the importance of the protection of fundamental rights in Article F(2): "The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law". This provision, however, is not justiciable by the Court of Justice; see, e.g., S. Weatherill and P. Beaumont, *EC Law: The Essential Guide to the Legal Workings of the European Community* (1993), p. 223.

<sup>6</sup> For a proposal to draft such a bill of rights, see K. Lenaerts, 'Fundamental Rights to be Included in a Community Catalogue', 28 C.M.L.Rev. 367 (1991).

they form an integral part of the general principles of Community law.<sup>7</sup> In safeguarding these rights the ECJ is inspired by the common constitutional traditions of the Member States and the international treaties for the protection of human rights concluded by them. The textual basis for its case-law is principally Article 164 EC but also Article 173 EC which, as noted above, refers to the infringement of any rule of law relating to the application of the Treaty as a criterion of judicial review. The essential framework of the Court's case-law is formed by only five cases: *Stauder*,<sup>8</sup> *Internationale Handelsgesellschaft*,<sup>9</sup> *Nold*,<sup>10</sup> *Hauer*<sup>11</sup> and *Wachauf*.<sup>12</sup>

In 1969, the Commission authorized the Member States to make butter available at reduced prices to certain consumers, namely beneficiaries under a social welfare scheme whose income did not permit them to buy butter at normal prices. The Ulm resident Erich Stauder, recipient of a war victims' pension, qualified for assistance but considered it discriminatory to require him to reveal his name and address to sellers of butter. In his view, this requirement constituted an infringement of the fundamental rights enshrined in the German Basic Law. When he brought an action against the City of Ulm before the Stuttgart Administrative Court, this court decided to refer to the Court of Justice the question whether making the sale of butter to beneficiaries dependent on revealing the names of these people to the sellers could be considered compatible with the general principles of Community law. In its judgment, the Court of Justice first referred to the different language versions of the Decision. It could be argued that not all versions required the beneficiary to actually be named. The most liberal interpretation had to prevail, providing it was sufficient to achieve the goals pursued by the Decision. Therefore, the provision in question had to be construed as not requiring the identification of beneficiaries by name. Interpreted in this way, the Court concluded, "the provision at issue contains nothing capable of prejudicing the fundamental

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<sup>7</sup> See, e.g., M.A. Dausies, 'The Protection of Fundamental Rights in the Community Legal Order', 10 E.L. Rev. 398 (1985), p. 400.

<sup>8</sup> Case 29/69 *Stauder v. City of Ulm*, [1969] E.C.R. 419.

<sup>9</sup> Case 11/70 *Internationale Handelsgesellschaft v. Einfuhr- und Vorratstelle für Getreide und Futtermittel*, [1970] E.C.R. 1125.

<sup>10</sup> Case 4/73 *J. Nold v. Commission*, [1974] E.C.R. 491.

<sup>11</sup> Case 44/79 *Liselotte Hauer v. Land Rheinland-Pfalz*, [1979] E.C.R. 3727.

<sup>12</sup> Case 5/88 *Hubert Wachauf v. Federal Republic of Germany*, [1989] E.C.R. 2609.

human rights enshrined in the general principles of Community law and protected by the Court".<sup>13</sup> In this *Stauder* judgment, the Court of Justice thus recognized that fundamental rights are part of the general principles of Community law and that the Court is competent to safeguard the observance of such rights.

In 1967, the German import-export company Internationale Handelsgesellschaft, based in Frankfurt-am-Main, applied for a licence to export maize meal. The issue of the export licence was conditional on the payment of a deposit in order to secure that such export would indeed take place during the period of the validity of the licence. Since only about half of the maize meal was in fact exported, the deposit was partially forfeited. Therefore, the company brought an action before the Frankfurt Administrative Court. This court construed the system of export licences and deposits as constituting in reality an obligation to export. In its view, such a system was contrary to principles of national constitutional law, and in particular the principles of freedom of action and of disposition, of economic liberty and of proportionality. It therefore refused to accept the validity of the system. In his Opinion, Advocate-General Dutheillet de Lamothe referred to *Costa v. Enel*,<sup>14</sup> where it was decided that, because of its special and original nature, a Community measure could never be overridden by national law. This decision did not necessarily mean, however, that the fundamental principles of the domestic legal systems have no function in Community law, the Advocate-General argued. These principles "contribute to forming that philosophical, political and legal substratum common to the Member States from which through the case-law an unwritten Community law emerges, one of the essential aims of which is precisely to ensure the respect for the fundamental rights of the individual".<sup>15</sup> The Court of Justice confirmed that, although the validity of a Community act could not be affected by claims that it infringes fundamental rights protected by the constitution of a Member State, an examination should be made as to whether an analogous guarantee inherent in Community law had been disregarded.<sup>16</sup> The respect for fundamental rights "forms an integral part of the general principles of law protected by the Court of Justice",<sup>17</sup> and the protection of such fundamental rights, "whilst

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<sup>13</sup> [1969] E.C.R. 419, at 425 (paragraph 7).

<sup>14</sup> Case 6/64 *Costa v. ENEL*, [1964] E.C.R. 585.

<sup>15</sup> [1970] E.C.R. 1125, at 1146.

<sup>16</sup> [1970] E.C.R. 1125, at 1134 (paragraph 4).

<sup>17</sup> *Ibid.*

inspired by the constitutional traditions common to the Member States, must be ensured within the framework of the structure and objectives of the Community".<sup>18</sup> The Court thus acknowledged, firstly, the autonomous basis of the protection given to fundamental rights against measures adopted by the Community institutions. Secondly, it admitted that, as a source of recognition of the law, reference may be made to the basic principles of the national legal systems in order to identify those rights.<sup>19</sup>

In 1973, the company Nold brought a direct action before the Court of Justice under the ECSC Treaty. The firm requested the annulment of a decision by the Commission authorizing new terms of business of the mining company Ruhrkohle. Under the new terms, Nold no longer qualified for the right of direct purchase from this company. One of Nold's arguments before the Court of Justice was that it had an established right to its status as a direct wholesaler which was derived, *inter alia*, from the right to property and the right to the free pursuit of business activity, both of which are protected by the German Basic Law, the constitutions of other Member States, and various international treaties, in particular the European Convention for the Protection of Human Rights. In its judgment, the Court first confirmed that fundamental rights form an integral part of the general principles of law, the observance of which the Court protects. It subsequently held that:

In safeguarding these rights, the Court is bound to draw inspiration from constitutional traditions common to the Member States, and it cannot therefore uphold measures which are incompatible with fundamental rights recognized and protected by the Constitutions of those States.<sup>20</sup>

Similarly, international treaties for the protection of human rights on which the Member States have collaborated or of which they are signatories, can supply guidelines which should be followed within the framework of Community law.<sup>21</sup>

However, the Court continued, fundamental rights protected by national constitutions are never "unfettered prerogatives", but instead must be viewed in the light of their social function. These rights are always subject to restrictions laid down in accordance with the public interest. In the Community "it likewise seems legitimate that these rights should, if necessary, be subject to certain limits justified by the overall objectives pursued by the

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<sup>18</sup> *Ibid.*

<sup>19</sup> See Dausès, *supra* note 7, at 401.

<sup>20</sup> [1974] E.C.R. 491, at 507 (paragraph 13).

<sup>21</sup> *Ibid.*

Community, on condition that the substance of these rights is left untouched".<sup>22</sup> Nold's argument failed since the fundamental rights claimed by it could not protect the company's "mere commercial interest or opportunities, the uncertainties of which are part of the very essence of economic activity".<sup>23</sup>

As the owner of a plot of land in Germany, Liselotte Hauer applied to the Land Rheinland-Pfalz for permission to plant vines on her property. The application was rejected, *inter alia*, on the basis of a Council regulation prohibiting new planting. The German court before which Hauer brought her action referred questions to the Court of Justice for a preliminary ruling. One of Hauer's arguments was that the regulation infringed her right to property, as well as her fundamental right to freely pursue a profession or trade. Advocate-General Capotorti, referring to the Court's previous judgments, admitted that the protection of fundamental rights constituted an integral part of the general legal principles, respect for which is ensured by the Court of Justice. The respect for private property, Capotorti argued, is common to the legal orders of the Member States and enshrined in Article I of the first Protocol to the European Convention.<sup>24</sup> But, referring to *Nold*, the Advocate-General reminded his audience of the fact that these rights nonetheless are subject to limits justified by the overall objectives pursued by the Community; that is to say, on condition that the substance of the rights is not touched.<sup>25</sup> In his view, the limitation imposed on landowners by the general prohibition on new plantings of vine was justified by reasons of public interest.<sup>26</sup>

The Court also assessed the case in the light of the ideas common to the constitutions of the Member States, which, as the Court said, also are reflected in the first Protocol to the European Convention. The ECJ deemed it "necessary to examine whether the restrictions introduced by the provisions in dispute in fact correspond to objectives of general interest pursued by the Community or whether, with regard to the aim pursued, they constitute a disproportionate and intolerable interference with the rights of the owner, impinging upon

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<sup>22</sup> [1974] E.C.R. 491, at 508 (paragraph 14).

<sup>23</sup> *Ibid.*

<sup>24</sup> [1979] E.C.R. 3727, at 3759.

<sup>25</sup> *Ibid.*

<sup>26</sup> [1979] E.C.R. 3727, at 3763.

the very substance of the right to property".<sup>27</sup> The Court subsequently concluded that the limitation imposed upon the use of property by the general prohibition was justified by the objectives of public interest pursued by the Community and did not violate the substance of the right to property as recognized in the Community.<sup>28</sup> As regards Hauer's freedom to pursue her occupation as a wine-grower, the Court held that the restriction of that right was no more than a consequence of the restriction on the exercise of the right to property, and therefore was justified on the same grounds.<sup>29</sup>

Hubert Wachauf was the tenant of a farm in Germany. When the tenancy agreement expired, he applied for compensation provided for under German legislation which was based on a Community regulation. The German law required that such application had to be accompanied by the written consent of the landlord. The authority in question refused to grant Wachauf compensation because his landlord had withdrawn his initially given consent. Therefore, the farmer brought proceedings before the Administrative Court of Frankfurt-am-Main. This court deemed it necessary to stay the proceedings and refer questions to the Court of Justice. The national court questioned, *inter alia*, whether the rule requiring the landlord's consent was compatible with constitutional guarantees of equality and of respect for private property. The Court agreed with its Advocate-General, who had argued that it was quite obvious that the Member States, in relation to the principle of respect for fundamental rights, must be subject to the same constraints as the Community.<sup>30</sup> It first summarized its previous case-law and subsequently stated that the requirements of the protection of fundamental rights "are also binding on the Member States when they implement Community rules".<sup>31</sup> In *Cinétheque*,<sup>32</sup> however, the Court had made it clear that "it has no power to examine the

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<sup>27</sup> [1979] E.C.R. 3727, at 3747 (paragraph 23).

<sup>28</sup> [1979] E.C.R. 3727, at 3749 (paragraph 30).

<sup>29</sup> [1979] E.C.R. 3727, at 3750 (paragraph 32).

<sup>30</sup> See Opinion AG Jacobs: "... it appears to me self-evident that when acting in pursuance of powers granted under Community law, Member States must be subject to the same constraints, in any event in relation to the principle of respect for fundamental rights, as the Community legislator". [1989] E.C.R. 2609, at 2629.

<sup>31</sup> [1989] E.C.R. 2609, at 2639 (paragraph 19). See also Case C-260/89 *Elleniki Radiophonia Tileorassi (ERT) v. Dimotiki Etairia Pliroforissis and Sotirios Kouvelas*, [1991] E.C.R. 2925.

<sup>32</sup> Joined Cases 60 and 61/84 *Cinétheque and Others v. Fédération nationale des cinémas français*, [1985] E.C.R. 2605.



compatibility with the European Convention of national legislation which concerns, as in this case, an area which falls within the jurisdiction of the national legislator".<sup>33</sup> It has been argued that the Court could not have reached the *Wachauf* decision had it not subtly reworded the *Cinétheque* formula in *Demirel*<sup>34</sup> to the Court "has no power to examine the compatibility with the European Convention on Human Rights of national legislation lying outside the scope of Community law".<sup>35</sup>

*Nold* and *Hauer* clarified the importance of guarantees of fundamental rights provided for by international agreements, in particular the European Convention ratified by all the Member States. Although not recognized as binding within the Community legal system, the Convention was acknowledged to fulfil an important function as a point of orientation and as an additional source of inspiration.<sup>36</sup> The *Nold* and *Hauer* decisions also consolidated and reinforced the Court's previous case-law. The Court explained the relationship between the protection of human rights guaranteed by the Community and the principles of domestic constitutional law regarding such rights, stressing that it cannot uphold measures which are incompatible with fundamental rights recognized and protected by the constitutions of the Member States.<sup>37</sup> A majority of the authors and the Commission have construed this phrase as meaning that the substance of Community human rights is determined by the national constitution which provides the highest level of protection in a specific case.<sup>38</sup> The Court, however, has never pronounced itself on the issue. It also remains uncertain whether it is sufficient for a fundamental right to be contained in the constitution of one Member State for the Court to adopt it.<sup>39</sup> Most importantly, however, *Nold* and *Hauer* further elaborated the concept of 'inherent limitations of fundamental rights', first referred to in *Internationale*

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<sup>33</sup> [1985] E.C.R. 2605, at 2627 (paragraph 26).

<sup>34</sup> Case 12/86 *Meryem Demirel v. Stadt Schwäbisch Gmünd*, [1987] E.C.R. 3719.

<sup>35</sup> [1987] E.C.R. 3719, at 3754 (paragraph 28). See J. Coppel and A. O'Neill, 'The European Court of Justice: Taking Rights Seriously', 29 C.M.L.Rev. 669 (1992), p. 680.

<sup>36</sup> See Dauses, *supra* note 7, at 401.

<sup>37</sup> *Ibid.*

<sup>38</sup> See Dauses, *supra* note 7, at 408. See also Commission, 'The Protection of Fundamental Rights in the European Community', Bull. Supp. 5/76, p. 16.

<sup>39</sup> In *IRCA*, Advocate General Warner argued that this should be sufficient; see Case 7/76 *IRCA v. Amministrazione delle Finanze dello Stato*, [1976] E.C.R. 1213, at 1237.

*Handelsgesellschaft*. These fundamental rights, "far from constituting unfettered prerogatives, must be viewed in the light of the social function of the property and activities protected thereunder".<sup>40</sup> In the *Hauer* judgment, the Court mentioned the three conditions which must be met before interference with fundamental rights may be justified. First, the interference must be justified by the objectives of public interest pursued by the Community; second, the interference must be in proportion to those objectives; and, third, the substance of the protected right must be guaranteed. The specific method adopted by the Court of Justice may be viewed as a two-phased procedure wherein it first establishes a constitutional principle derived from comparative analysis and subsequently applies the principle in the Community context.<sup>41</sup> In the first phase the Court identifies the general principle and, in the second phase, it applies three specific tests: the measure must correspond to objectives of public interest pursued by the Community; the measure must be proportionate; and the substance of the right must be guaranteed.<sup>42</sup>

In *Nold*, Advocate General Trabucchi reminded the Court of its task to ensure that the law is observed in the application of the Treaty, and noted that the Court should be especially careful when dealing with problems which concern those fundamental rights forming the basis of every civil society. The respect for liberty, property ownership, principles of equality, non-discrimination, and proportionality form a part of that concept of law which governs and forms the framework for the whole Community legal system, and from which that system may never deviate.<sup>43</sup> The acts of the Community institutions and the implementing measures of Member States must all respect these principles and it is the duty of the Court to guarantee that they are fully applied. The Community legal system certainly cannot ignore the right of every citizen to engage in trade. However, the protection of the public interest, both by national legal orders and by the Community legal order, does restrict the exercise of trading activity in several respects, since no constitution can ever specify precisely the

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<sup>40</sup> [1974] E.C.R. 491, at 508 (paragraph 14).

<sup>41</sup> See J.H.H. Weiler, 'Eurocracy and Distrust: Some Questions Concerning the Role of the European Court of Justice in the Protection of Fundamental Human Rights within the Legal Order of the European Communities', 61 Wash. L. Rev. 1103 (1986), p. 1133.

<sup>42</sup> See, similarly, Weiler, *supra* note 41, at 1130/1131.

<sup>43</sup> See Opinion AG Trabucchi, [1974] E.C.R. 491, at 513-514.

rules needed to satisfy the changing requirements of economic reality.<sup>44</sup> But who can determine what the 'requirements' are? Who feels competent enough? In the *Banana Case*, the Commission admitted that the consequences of the regulation were difficult to foresee. The exact 'requirements' were not at all clear. It is the Court's view that when future effects cannot be foreseen accurately, the legislature's "assessment is open to criticism only if it appears manifestly incorrect in the light of the information available to it at the time of the adoption of the rules in question".<sup>45</sup> But when is legislation 'manifestly incorrect'? The Court does not seem to have a clear standard, a touchstone, against which it measures legislation.

### *C. Specific Principles of Community Law*

In the view of the Court, fundamental human rights form an integral part of the general principles of law which are an integral part of the Community legal system.<sup>46</sup> Examples of actual fundamental rights are the right to property and the freedom to pursue a trade. Fundamental rights must be distinguished from general principles of administrative and procedural law. These principles are analogous to fundamental rights and thus also protected by the Court. Examples of such principles are proportionality, legal certainty, protection of legitimate expectations, and due process. The principle of equality or non-discrimination has a special position in the Community legal system. It is not only considered a general principle of Community law but, in addition, has found expression in the EC Treaty. The freedom of competition is also recognized by the Court as a general principle of law.

#### 1. The Non-discrimination Principle

As noted above, the principle of non-discrimination is one of the general principles of

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<sup>44</sup> [1974] E.C.R. 491, at 514-515.

<sup>45</sup> Joined Cases C-267 to C-285/88 *Gustave Wuidart and Others v. Laiterie coopérative eupenoise and Others*, [1990] E.C.R. I-435 (paragraph 14).

<sup>46</sup> Also part of these general principles are the international rules of *ius cogens*. See, e.g., H.G. Schermers, 'The European Communities Bound by Fundamental Human Rights', 27 C.M.L.Rev. 249 (1990), p. 252.

Community law. It has been explicitly recognized by the Court as a superior rule of law<sup>47</sup> and is laid down in Article 6 EC: "Within the scope of application of this Treaty, and without prejudice to any special provisions contained therein, any discrimination on the grounds of nationality shall be prohibited". The principle entails that comparable situations may not be treated in a different manner unless the different treatment is objectively justified.<sup>48</sup> Discrimination means "treating differently situations which are identical, or treating in the same way situations which are different".<sup>49</sup> Non-discrimination concerns "the relationship between various groups of persons and takes the form of equality of treatment by bodies vested with public authority".<sup>50</sup> Prohibitions of discrimination are also laid down in other provisions of the Treaty. According to Article 40(3) of the Treaty, for example, the common organization of agricultural markets must exclude any discrimination between producers or consumers within the Community. It is common ground that this prohibition of discrimination is only a specific expression of the general principle of non-discrimination.<sup>51</sup>

In the view of the Court of Justice, the principle of non-discrimination does not have an 'external' component. The Court consistently has upheld the discretion of the Commission to impose discriminatory import restrictions in violation of GATT non-discrimination obligations. Community import restrictions frequently discriminate between supplier countries in breach of GATT law, for example, in violation of Article XIII. Under Article XIII(1), "no prohibition or restriction shall be applied by any contracting party on the importation of any product of the territory of any other contracting party or on the exportation of any product destined for the territory of any other contracting party, unless the importation of the like product of all third countries or the exportation of the like product to all third countries is similarly prohibited or restricted". Such import restrictions also

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<sup>47</sup> Case 50/86 *Les Grand Moulins de Paris v. European Economic Community*, [1987] E.C.R. 4833, at 4857 (paragraph 10).

<sup>48</sup> See, e.g., Case C-177/90 *Ralf-Herbert Kühn v. Landwirtschaftskammer Weser-Ems*, [1992] E.C.R. I-35, at I-64 (paragraph 18).

<sup>49</sup> Case 8/82 *Hans-Otto Wagner v. Bundesanstalt für landwirtschaftliche Marktordeung*, [1983] E.C.R. 371, at 387 (paragraph 18).

<sup>50</sup> See Advocate-General Capotorti in Case 114/76 *Bela-Mühle Josef Bergmann v. Grows-Farm*, [1977] E.C.R. 1211, at 1230.

<sup>51</sup> See, e.g., Joined Cases 117/76 and 16/77 *Albert Ruckdeschel and Hansa-Lagerhaus Ströh v. Hauptzollamt Hamburg-St. Annen; Diamalt v. Hauptzollamt Itzehoe*, [1977] E.C.R. 1753, at 1769 (paragraph 7); Case 281/82 *Unifrex v. Commission and Council*, [1984] E.C.R. 1969, at 1986 (paragraph 30).

discriminate, however, between competing European traders importing from the supplier countries in question. The Court has been unwilling to acknowledge this important aspect of the principle of non-discrimination. In *Balkan-Import-Export*<sup>52</sup> the Court held that "in the Treaty there exists no general principle obliging the Community, in its external relations, to accord to third countries equal treatment in all respects and in any event traders do not have the right to rely on the existence of such a general principle".<sup>53</sup> This ruling was confirmed in *Edeka*<sup>54</sup> and *Faust*.<sup>55</sup> In both these cases, the contested measures were Community protective measures restricting the importation of mushrooms from Taiwan as a consequence of a change in the political and economic relationship between the Community and China. In *Faust*, the Court held that:

... there exists in the Treaty no general principle obliging the Community, in its external relations, to accord to non-member countries equal treatment in all respects. It is thus not necessary to examine on what basis Faust might seek to rely upon the prohibition of discrimination between producers or consumers within the Community contained in Article 40 of the Treaty. It need merely be observed that, if different treatment of non-member countries is compatible with Community law, different treatment accorded to traders within the Community must also be regarded as compatible with Community law, where that different treatment is merely an automatic consequence of the different treatment accorded to non-member countries with which such traders have entered into commercial relations".<sup>56</sup>

As explained previously, differential treatment of non-Member countries which are WTO members is not compatible with Community law. The WTO Agreement, including the GATT, is an integral part of Community law and has a higher ranking than secondary Community law. Taiwan and China were not GATT contracting parties, but this fact does not appear to be a decisive factor in the Court's opinion. The *Dürbeck Case*,<sup>57</sup> for example, concerned protective measures in respect of dessert apples from Chile, a contracting party to GATT at the time and now a WTO member. Chile had refused to conclude a VER with the Community authorities even though the other main apple-exporting countries concerned, Argentina, Australia, New Zealand and South Africa, had agreed to export restraints. Chile complained in GATT and a Panel considered the protective measures inconsistent with

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<sup>52</sup> Case 55/75 *Balkan-Import-Export GmbH v. Hauptzollamt Berlin-Packhof*, [1976] E.C.R. 19.

<sup>53</sup> [1976] E.C.R. 19, at 32 (paragraph 14).

<sup>54</sup> Case 245/81 *Edeka Zentrale v. Federal Republic of Germany*, [1982] E.C.R. 2745.

<sup>55</sup> Case 52/81 *Werner Faust v. Commission*, [1982] E.C.R. 3745.

<sup>56</sup> [1982] E.C.R. 3745, at 3762 (paragraph 25).

<sup>57</sup> Case 112/80 *Anton Dürbeck v. Hauptzollamt Frankfurt am Main-Flughafen*, [1981] E.C.R. 1095.

several provisions of GATT law.<sup>58</sup> Subsequently, the dispute also came before the Court of Justice. German importer *Dürbeck* contested the measures before the Hessisches Finanzgericht which submitted a preliminary question to the European Court. After stating that the Commission had not violated the principle of non-discrimination by refusing to extend the postponement of protective measures for goods in transit to apples which had not yet left a Chilean port, the Court of Justice, in a most extraordinary passage, declared that: "On the contrary the extension of those arrangements to imports, limited as they were, from a country which had not accepted the voluntary export restraint clause proposed by the Commission would have been discriminatory in regard to the other countries in the southern hemisphere which had accepted such a clause and would have endangered the observance of the commitments assumed by those countries".<sup>59</sup> In other words, the Commission would have breached the principle of non-discrimination if it had acted in conformity with GATT law in respect of Chile. If it had obeyed GATT law, it would have endangered the observance of illegal VERs by the other countries. Thus, if it had obeyed GATT law, it would have stopped others from violating GATT law. This the Court would not have accepted.

## 2. The Right to Property and the Freedom to Trade

The right to property and the right to pursue a trade or profession often overlap. As can be seen from the rulings in *Hauer* and *ADBHU*,<sup>60</sup> it is clear that they are both fundamental rights protected by the Court. As with all fundamental rights, these rights are not absolute but must be viewed in relation to their social function. In *Hauer*, the Court held that it was necessary to examine whether the restrictive measures constituted "a disproportionate and intolerable interference with the rights of the owner, impinging upon the very substance of the right to property".<sup>61</sup> In *ADBHU*, after having stated that "the principle of free movement of goods and freedom of competition, together with freedom of trade as a fundamental right, are

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<sup>58</sup> See *European Economic Community - Restrictions of Apples from Chile*, BISD 27S\98.

<sup>59</sup> [1981] E.C.R. 1095, at 1122 (paragraph 55).

<sup>60</sup> Case 240/83 *Procureur de la République v. Association de défense des brûleurs d'huiles usagées (ADBHU)*, [1985] E.C.R. 531.

<sup>61</sup> [1979] E.C.R. 3727, at 3747 (paragraph 23).

general principles of law of which the Court ensures observance",<sup>62</sup> the Court made clear that this fundamental right, far from constituting an unfettered prerogative, must be viewed in the light of its social function. In *Schröder*<sup>63</sup> the Court declared that both the right to property and the freedom to trade may be restricted, particularly in the context of a common organization of a market:

both the right to property and the freedom to pursue a trade or profession form part of the general principles of Community law. However, those principles do not constitute an unfettered prerogative, but must be viewed in the light of the social function of the activities protected thereunder. Consequently, the right to property and the freedom to pursue a trade or profession may be restricted, particularly in the context of a common organization of the market, provided that those restrictions in fact correspond to objectives of general interest pursued by the Community and that they do not constitute a disproportionate and intolerable interference which infringes upon the very substance of the rights guaranteed.<sup>64</sup>

Is there an external component of the right to property and the freedom of trade? Is there a right to exchange property rights across EC borders, or in other words, a right to freely import from and export to third countries? Although several freedom of trade guarantees can be found in secondary Community law - Council Regulation 282/82 on common rules for imports, for example, states that "importation into the Community (...) shall be free, and therefore not subject to any quantitative restriction"<sup>65</sup> - freedom of foreign trade as a fundamental right has never been referred to by the Court. The Court, however, has declared that it is bound to draw inspiration from constitutional traditions common to the Member States and the freedom to foreign trade is recognized in German constitutional law.<sup>66</sup> As noted above, a majority of commentators has argued that the substance of Community fundamental rights should be determined by the national constitution which provides the highest level of protection in a specific case.

Article 12 of the German Basic Law refers to "the right freely to choose trade, occupation, or profession", while Paragraph 1 of the German Law on Foreign Economic Relations clarifies that "in principle trade and commerce with foreign economic areas are free as to goods, services, capital, payments or other economic transactions as well as to transactions between

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<sup>62</sup> [1985] E.C.R. 531, at 548 (paragraph 9) (emphasis added).

<sup>63</sup> Case 265/87 *Hermann Schröder v. Hauptzollamt Gronau*, [1989] E.C.R. 2237.

<sup>64</sup> [1989] E.C.R. 2237, at 2268 (paragraph 15).

<sup>65</sup> Derogations are possible on the basis of Title V.

<sup>66</sup> See E.-U. Petersmann, 'National Constitutions, Foreign Trade Policy and European Community Law', 3 Eur. J. Int'l L. 1 (1992), p. 13.

residents in foreign assets and gold".<sup>67</sup> Paragraph 2, section 2, then provides that: "Restrictions are to be limited as to character and extent to the minimum necessary to achieve the purpose stipulated in the empowering legislation. These are to be formulated in such a way as to interfere as little as possible with the liberty of economic activities. Restrictions may affect existing contracts only if the purpose to be achieved would otherwise substantially be endangered".<sup>68</sup> The Court could adopt a similar approach and also recognize the freedom of foreign trade. In his book *Free to Choose*, Milton Friedman has urged the necessity of a constitutional recognition of the freedom of foreign trade in the United States by means of a 'Free Trade Amendment'.<sup>69</sup> Recognition by the Court of Justice of a fundamental right to freely import and export does not seem likely in the near future. The Court seems determined to construe restrictions of this right that are illegal under GATT as consistent with Community law.

### 3. The Principle of Proportionality

In *Fromançais*,<sup>70</sup> the Court of Justice defined the principle of proportionality as follows: "In order to establish whether a provision of Community law is consonant with the principle of proportionality it is necessary to establish, in the first place, whether the means it employs to achieve its aim correspond to the importance of the aim and, in the second place, whether they are necessary for its achievement".<sup>71</sup> According to the principle of proportionality, the means used by the authorities must be in proportion to their purpose.<sup>72</sup> It thus requires that restrictions on individual freedoms be kept to a minimum. In order to determine what is required and proportionate to achieve economic objectives without unnecessarily restricting individual freedoms, an analysis of the economic efficiency and effects of alternative legal

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<sup>67</sup> Quoted from Petersmann, *supra* note 66, at 13/14.

<sup>68</sup> Quoted from: E.-U. Petersmann, *Constitutional Functions and Constitutional Problems of International Economic Law* (1991), p. 341.

<sup>69</sup> See M. en R. Friedman, *Free to Choose* (1980).

<sup>70</sup> Case 66/82 *Fromançais v. Fonds d'orientation et de régularisation des marchés agricoles (FORMA)*, [1983] E.C.R. 395.

<sup>71</sup> [1983] E.C.R. 395, at 404 (paragraph 8).

<sup>72</sup> See Schermers and Waelbroeck, *supra* note 3, at 77.



regulations seems required. In the *Bela-Mühle* Case, Advocate-General Capotorti had explained that: "The principle of proportionality means that the burdens imposed on the persons concerned must not exceed the steps required in order to meet the public interest involved. If, therefore, a measure imposes on certain categories of persons a burden which is in excess of what is necessary - which must be appraised in the light of the actual economic and social conditions and having regard to the means available - it violates the principle of proportionality".<sup>73</sup> The Court of Justice then declared purchase requirements imposed on producers of feeding-stuffs for animals invalid on the grounds that the height at which the price level was fixed and the purchase requirements were disproportionate to attain the objective in view, namely the disposal of surplus stocks of skimmed milk powder.

In the field of foreign trade, the Court never has bothered to measure empirically the various effects of foreign trade restrictions on price, production, and consumption, even if these restrictions had been imposed in a discriminatory way and in manifest violation of GATT law.<sup>74</sup> In *Edeka*, the Court even openly supported the Community's harmful 'grey area' practice by justifying import restrictions in violation of GATT law on the basis of the principle of proportionality. It stated that:

The Commission's attempt, before adopting coercive measures to obtain the agreement of supplier countries on a voluntary restriction of their exports to the Community cannot be regarded as being unacceptable from the point of view of Community law since it demonstrates the Community effort to refrain from adopting coercive measures unless all else fails.<sup>75</sup>

It follows that the Commission is justified, when adopting protective measures, in taking account of whether or not a non-member country is ready to accept a voluntary restriction of its exports to the Community. It cannot therefore be said that it exceeded the limits of its discretionary power by almost totally prohibiting imports from Taiwan and South Korea, countries which did not agree to such a voluntary restraint, in favour of imports originating in the People's Republic of China, which did accept an agreement of voluntary restraint, even though such a prohibition is capable of bringing about a deflection in the flow of imports from Taiwan and South Korea to the People's Republic of China.<sup>76</sup>

Guarantees in secondary Community law of freedoms to import and export are frequently minimized on the basis of the principle of proportionality. The Commission is usually permitted to take the protective measures it deems 'necessary'.

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<sup>73</sup> [1977] E.C.R. 1211, at 1232.

<sup>74</sup> See Petersmann, *supra* note 68, at 80.

<sup>75</sup> [1982] E.C.R. 2745, at 2757 (paragraph 22).

<sup>76</sup> [1982] E.C.R. 2745, at 2757 (paragraph 23).

#### 4. The Principle of Undistorted Competition

Article 3(g) of the EC Treaty requires a system ensuring that competition in the common market is not distorted. Numerous Treaty provisions are aimed, directly or indirectly, at the creation of a level-playing field. Such provisions include, for example, Articles 12 to 17 which call for the elimination of customs duties between the Member States; Articles 30 to 36 which are aimed at the elimination of quantitative restrictions; Articles 85 and 86, containing rules applying to undertakings, which prohibit agreements restricting competition and the abuse of a dominant position; and Article 92, which restricts State subsidy practices. In *ADBHU*, the Court held that "the principle of free movement of goods and *freedom of competition*, together with freedom of trade as a fundamental right, are general principles of law of which the Court ensures observance".<sup>77</sup> However, freedom of competition as a general principle of Community law is virtually meaningless in view of the fact that it must yield to other policies which are considered more important. For example, the Treaty accords a special position to agricultural policy. Article 42 provides: "The provisions of the Chapter relating to rules on competition shall apply to production of and trade in agricultural products only to the extent determined by the Council (...). The Council may, in particular, authorise the granting of aid: (a) for the protection of enterprises handicapped by structural or natural conditions; (b) within the framework of economic development programmes". In *Maizena*,<sup>78</sup> the Court held that Article 42 simultaneously recognized "the precedence the agricultural policy has over the aims of the Treaty in relation to competition and the power of the Council to decide how far the rules on competition should apply to the agricultural sector. The Council has a wide discretion in the exercise of that power as it has in the implementation of the whole agricultural policy".<sup>79</sup>

Competition within the Community may not be distorted only by agreements between undertakings which, for example, fix purchase or selling prices, limit or control production, or provide for market sharing. Import restrictions also may have a negative effect on competitive conditions. Tariffs, for example, raise the price of imported products and thus reduce competition between the protected domestic good and the imported one. The less

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<sup>77</sup> [1985] E.C.R. 531, at 548 (paragraph 9) (emphasis added).

<sup>78</sup> Case 139/79 *Maizena v. Council*, [1980] E.C.R. 3393.

<sup>79</sup> [1980] E.C.R. 3393, at 3421 (paragraph 23).

productive, non-competitive domestic industry is allowed to expand, often at the expense of more productive domestic industries. Frequently, import restrictions directly discriminate between domestic importers and thus distort competitive conditions between them. In *Faust* and *Edeka* the distortion of competitive conditions between mushroom importers was obvious. Will the Court of Justice change its attitude in light of the new Article 3a(1) EC? As explicitly stated in this provision, economic policy must be conducted in accordance with the principle of an open market economy with free competition.

### 5. The Principle of Legal Certainty

According to the principle of legal certainty, the application of the law to a specific situation must be predictable.<sup>80</sup> The Court of Justice has recognized this general principle of legal certainty as "a rule of law to be upheld in the application of the Treaty".<sup>81</sup> An aspect of legal certainty is that the law should not be different from that which could be reasonably or legitimately expected.<sup>82</sup> Sharpston has defined the concept 'legitimate expectation' as "the particular form of economic prediction for which an economic agent can claim legal validity in Community law, as being a belief that it was legitimate for him to entertain as to the way in which he would be treated by an administration in the application of Community regulations".<sup>83</sup> The principle of estoppel is closely related to both the principle of legitimate expectations and the principle of good faith. Its purpose is to prohibit a public authority (or a person) from performing certain acts where those acts are at variance with the result brought about by that authority's (or person's) conduct.<sup>84</sup> Estoppel has never been expressly accepted by the Court, although it has said that the mere fact that estoppel is not mentioned

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<sup>80</sup> See Schermers and Waelbroeck, *supra* note 3, at 52.

<sup>81</sup> Case 13/61 *De Geus en Uitdenbogaerd v. Robert Bosch*, [1962] E.C.R. 91, at 107.

<sup>82</sup> See Schermers and Waelbroeck, *supra* note 3, at 65. Although the principle has usually been applied to individual administrative measures only, the Court of Justice has extended it to Community legislative measures, particularly in the area of the common organization of agricultural markets. According to Mertens de Wilmars this is the case because here measures intended to encourage traders are, from an economic point of view, often so specific that their effects are similar to those of an individual decision. See J. Mertens de Wilmars, 'The Case-Law of the Court of Justice in Relation to the Review of the Legality of Economic Policy in Mixed-Economy Systems', L.I.E.I. 1 (1982), pp. 14/15.

<sup>83</sup> See E. Sharpston, 'Legitimate Expectations and Economic Reality', 15 E.L.Rev. 103 (1990), p. 105.

<sup>84</sup> See Schermers and Waelbroeck, *supra* note 3, at 83.

in written law is not sufficient proof that it does not exist.<sup>85</sup> In *Boizard*,<sup>86</sup> Advocate General Warner held that since the principle is recognized in, at least, Danish, English, Scottish, German, Italian and French law, "there emerges a general principle (applicable to a public authority except where that would be irreconcilable with its public duty) that one who, having legal relations with another, by his conduct misleads that other as to material fact (including the existence of a right) cannot thereafter base on that fact a claim against him if he (that other) has acted in a relevant way in reliance on what he was led by that conduct to believe".<sup>87</sup> The Court has been reluctant in accepting pleas based on legal certainty, the protection of legitimate expectations or estoppel. According to former judge Lord Mackenzie Stuart, the reason for this reluctance is that the Court of Justice "is often dealing with undertakings which are experts in the market, well-informed and well-advised, so that healthy scepticism is shown for claims that such firms had no idea what was going on".<sup>88</sup> The reasoning of the Court usually has been that since the disputed measure constituted a measure in the sphere of economic policy, and no flagrant violation of a superior rule of law for the protection of the individual had occurred, it had to be upheld.<sup>89</sup>

The principles of legal certainty, legitimate expectations and estoppel also have been invoked in foreign trade cases but, as in intra-trade disputes, claims seldom have been successful. Illustrations of the principle of legal certainty can be found in Community foreign trade law, for example in Council Regulation 288/82 on common rules for imports.<sup>90</sup> According to recital 14 of the preamble "it is for the Commission and the Council to adopt the protective measures called for by the interests of the Community with due regard for existing international obligations". Recital 15 subsequently states that, "therefore, protective measures against a country which is a contracting party to GATT may be considered only if the product in question is imported into the Community in such greatly increased quantities and

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<sup>85</sup> Case 108/63 *A. Merlini v. High Authority*, [1965] E.C.R. 1, at 14.

<sup>86</sup> Joined Cases 63 and 64/79 *Boizard v. Commission*, [1980] E.C.R. 2975.

<sup>87</sup> [1980] E.C.R. 2975, at 3002.

<sup>88</sup> See Lord Mackenzie Stuart, 'Legitimate Expectations and Estoppel in Community Law and English Administrative Law', L.I.E.I. 53 (1983), p. 73.

<sup>89</sup> See, e.g., Joined Cases 54 - 60/76 *Compagnie Industrielle et Agricole du Comté de Loheac and Others v. Council and Commission*, [1977] E.C.R. 645, at 658 (paragraph 8).

<sup>90</sup> Council Regulation (EEC) 288/82 on common rules for imports, OJ L 35/82 (5 February 1982).

on such terms or conditions as to cause, or threaten to cause, substantial injury to Community producers of like or directly competing products, unless international obligations permit derogation from this rule". These references may lead rational and prudent traders, who faithfully check relevant Community legislation before embarking on import, to believe that the Community institutions actually will observe the Community's GATT obligations. Rational and prudent traders who are wise enough to understand that a preamble is mainly of rhetorical value will look beyond it and find that in Article 1(2) of Council Regulation 288/82 it is stated that "importation into the Community (...) shall be free, and therefore not subject to any quantitative restriction, without prejudice to (...) measures which may be taken under Title V". Title V permits protective measures under Article 15, which is couched in terms similar to Article XIX of GATT. Therefore, the rational and prudent trader who has read the entire regulation and knows basic GATT law, sees his first impression - that the Community must observe its GATT obligations when taking protective measures - confirmed. Nonetheless, when he claims that therefore the Community cannot impose import restrictions in breach of GATT law, he is disappointed.

When in a case before the Court concerning foreign trade measures traders claim that their legitimate expectations have been encroached upon, their chances are not any better. In *Faust*, the mushroom importers claimed that the prohibition of imports from Taiwan violated the principle of legitimate expectations, which required that traditional trading relations be maintained. The Court did not agree. The commercial agreement between the Community and China "was of such a nature as to alert traders to an imminent change of direction in the Community's commercial policy and, in the absence of any obligation on the part of the Community to accord equal treatment to non-member countries, no informed trader was entitled to expect that patterns of trade existing when the protective measures were adopted would be respected".<sup>91</sup> In the view of the Court, major shifts in political alignment are a risk which informed economic agents must accept when they decide to trade.<sup>92</sup> It does not seem to make a difference whether the third countries where the goods in question originate are GATT parties or not. In *Dürbeck*, the plaintiff claimed that the Commission had violated the principle of legitimate expectation because it had adopted protective measures after the importers concerned had entered into supply and affreightment contracts, and without

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<sup>91</sup> [1982] E.C.R. 3745, at 3762/3763 (paragraph 27).

<sup>92</sup> See also Sharpston, *supra* note 83, at 116.

making any provision for transitional measures in favour of these importers.<sup>93</sup> The Court referred to *Tomadini*<sup>94</sup> where it had held that, although the principle of legitimate expectation is one of the fundamental principles of the Community, nevertheless "the field of application of this principle cannot be extended to the point of generally preventing new rules from applying to the future effects of situations which arose under the earlier rules in the absence of obligations entered into with the public authorities", and that "this is particularly true in a field such as the common organization of markets, the purpose of which necessarily involves constant adjustment to the variations of the economic situation in the various agricultural sectors".<sup>95</sup> The Court therefore concluded that "in view of the needs which the temporary suspension of imports met, transitional measures which exempted contracts already entered into from the suspension of imports would have robbed the protective measure of all practical effect by opening the Community market in dessert apples to a volume of imports likely to jeopardize that market".<sup>96</sup>

In *Sofrimport*,<sup>97</sup> the Court did protect the legitimate expectation of a trader, although in this particular case the infringement of the trader's right was so obvious that the Court simply could not ignore it. The Commission had deemed it unnecessary to adopt transitional measures with respect to apples in transit from Chile, although a Council regulation specifically directed it to take account of the special position of goods in transit to the Community. In the view of the Commission, a reasonably careful trader could have expected anyway that the Commission might at any time take protective measures. The Court, however, decided that in view of the regulation which provided for special protection of the trader, "the measure should also have indicated the situations in which the public interest might justify the application of protective measures with regard to goods in transit".<sup>98</sup> It concluded therefore that "the Commission has not in this case demonstrated the existence of any overriding public interest justifying the application of suspensory measures with regard

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<sup>93</sup> [1981] E.C.R. 1095, at 1120 (paragraph 47).

<sup>94</sup> Case 84/78 *Angelo Tomadini v. Amministrazione delle Finanze dello Stato*, [1979] E.C.R. 1801.

<sup>95</sup> [1981] E.C.R. 1095, at 1121 (paragraph 48).

<sup>96</sup> [1981] E.C.R. 1095, at 1121 (paragraph 50).

<sup>97</sup> Case C-152/88 *Sofrimport v. Commission*, [1990] E.C.R. I-2477.

<sup>98</sup> [1990] E.C.R. 2477, at 2509 (paragraph 18).

to goods in transit".<sup>99</sup>

Does the principle of estoppel have an external component? Within the European Community, Member States may not rely on national legislation in a dispute with an individual when such legislation conflicts with sufficiently clear and unconditional provisions of a directive which the Member State has either failed to implement or has implemented incorrectly. VerLoren van Themaat has argued that this particular instance of the principle of estoppel could be interpreted to mean that, similarly, "the Community cannot rely either on its regulations or other measures on foreign trade in a conflict with a private party, as far as these regulations or other measures violate unconditional and sufficiently clear GATT provisions or MTN agreements".<sup>100</sup> He rightly notes that "this might be considered a logical consequence of the recognition of these provisions and agreements as binding for the Community".<sup>101</sup>

#### *D. Corresponding Principles of GATT Law*

In the *Banana Case*, the Court of Justice could have dealt with the arguments of the German government while taking notice of the binding rules of GATT. Several principles of GATT law directly correspond to the general principles and fundamental rights recognized by the Court. It is submitted that by doing so the EC economy would have suffered little harm, if any at all, and individual rights of traders would have been respected.

##### 1. The Non-discrimination Principle

GATT's principle of non-discrimination is the cornerstone of the WTO legal system. This principle in fact comprises two principles of equality which complement each other, the most-

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<sup>99</sup> [1990] E.C.R. 2477, at 2509 (paragraph 19).

<sup>100</sup> See P. VerLoren van Themaat, 'The Possibilities for National Measures of Implementation to Strengthen the Legal Quality of International Rules on Foreign Trade', in: D.C. Dicke and E.-U. Petersmann (eds.), *Foreign Trade in the Present and a New International Economic Order* (1988), p. 51.

<sup>101</sup> *Ibid.*

favoured-nation (MFN) rule of Article I and the national treatment rule of Article III. Article I(1) provides that: "any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties". This rule entails an obligation for each WTO member to extend to any other member the most favourable conditions under which it conducts trade with another country, member or non-member. The obligation applies to both border measures and internal measures affecting imports or exports.<sup>102</sup> It prohibits, for example, tariff specialization in order to protect the competitive benefits accruing from reciprocal tariff bindings.<sup>103</sup> Theoretically speaking, MFN treatment may be accorded either conditionally or unconditionally. In the past, most-favoured-nation clauses often were conditional, meaning that to become the beneficiary of MFN treatment a country had to give the awarding country some kind of reciprocal privilege. The GATT MFN clause, however, is unconditional; equivalent trade privileges must be granted without members receiving anything in return.<sup>104</sup> In this way, a more general trade liberalization is being achieved.

The national treatment obligation of Article III GATT requires the members to refrain from taxation and regulation of imported products "so as to afford protection to domestic production". In other words, when imported products have entered the domestic economy of a member, they may not be treated any worse than domestic products, nor may government measures promote the purchase of domestic products without likewise encouraging the purchase of imported products. The difference between the two complementing principles is clear. While the MFN rule requires equal treatment of foreign products, national treatment requires equal treatment of foreign products and the same or similar domestic products. The basic principles of MFN treatment and national treatment on internal taxation and regulation were devised to ensure the non-discriminatory access to markets. They are called the cornerstone of the GATT legal system since most other substantive GATT provisions either seek to implement these two principles (Article XIII for

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<sup>102</sup> See, e.g., Petersmann, *supra* note 68, at 227.

<sup>103</sup> See, e.g., *Japan - Customs Duties, Taxes and Labelling Practices on Imported Wines and Alcoholic Beverages*, BISD 34S/83, report adopted on 10 November 1987.

<sup>104</sup> See J.H. Jackson, *The World Trading System: Law and Policy of International Economic Relations* (1989), p. 137.



example) or stipulate exceptions.<sup>105</sup> Exceptions are scattered throughout the General Agreement. For example, certain long-established trade preferences between countries are allowed under Article I(2) and (3) and certain protective measures against unfair competition are permitted under Article VI. Additionally, Article XX provides for 'general exceptions' and Article XXI for 'security exceptions'; Article XXIV authorizes customs unions and free-trade areas; and Part IV contains exceptions for less developed members.

GATT obligations of non-discrimination do not call for any economic sacrifice to be made. If trade is liberalized in a non-discriminatory manner, all the gains from trade are truly exploited and all resources are used in the most efficient manner possible. Compliance with the rules on non-discrimination simply allows domestic traders, producers and consumers to buy and sell goods in the best markets. The GATT provisions on non-discrimination thus enhance the non-discrimination principles of national constitutions. Since discrimination among trading partners by a government implies discrimination among domestic traders which have entered into trade relations with these countries, the GATT provisions on non-discrimination also protect domestic traders.<sup>106</sup> These GATT rules thus promote fairness in the domestic legal system. In the *Banana Case*, the Court of Justice should have interpreted the general principle of non-discrimination in conformity with the GATT principle of non-discrimination. This interpretation would have stopped the unwarranted discrimination against traders in TC-bananas brought about by the regulation.

## 2. The Right to Property and the Freedom to Trade

Both the right to property and the freedom of trade are basic principles of GATT law and the WTO legal system. International economic transactions usually involve contracts for the sale, carriage, delivery and payment of goods, services or capital. Property rights, the legal titles to own the purchased goods, are thereby exchanged. The very purpose of international trade is to exchange property rights across borders.<sup>107</sup> By providing a legal framework for the conduct of trade policy, the WTO wants to protect these property rights. Frequent

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<sup>105</sup> See Petersmann, *supra* note 68, at 227.

<sup>106</sup> See Petersmann, *supra* note 68, at 228/229.

<sup>107</sup> See Petersmann, *supra* note 68, at 7-9.

infringement of property rights increases international transaction costs and reduces the quantity of foreign trade. Consequently, traders will be less assured that they will be able to capture the expected future profits of foreign trade transactions.<sup>108</sup>

Every trader in the world should be free to pursue the trade he chooses. Such freedom allows him to choose the trade that best suits his talents. Free choice of trade is conducive to each country's economic welfare. This basic neo-classical concept is long recognized within the European Community. The WTO legal system protects the freedom of trade and thus maximizes global economic welfare and each individual member's economic welfare. In the *Banana Case*, the Community principles of a right to property and a freedom to trade should have been construed by the Court in conformity with the basic corresponding GATT principles. Meaningful protection of property rights and substantial guarantees of a freedom to pursue a chosen trade must involve the right to seize opportunities in the world market, or in other words, a right to freely import and export.<sup>109</sup>

### 3. The Principle of Proportionality

There still is a widespread misunderstanding that GATT law requires the members to give up their own economic or social policy objectives. GATT law only restricts, and in some cases prohibits, the use of trade policy instruments which are generally considered to be harmful to the domestic economy. GATT law recognizes a specific ranking of trade policy instruments which is consonant with the economic theory of optimal intervention.<sup>110</sup> This theory makes clear that when government intervention is needed - for example, to achieve certain social policy goals - interventions directly at, or as close as possible to, the distortion in question will achieve the objective more efficiently than import restrictions. Barriers to trade will only

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<sup>108</sup> See Petersmann, *supra* note 68, at 9.

<sup>109</sup> See, e.g., H. Hauser, *Foreign Trade Policy and the Function of Rules for Trade Policy Making*, in: D.C. Dicke and E.-U. Petersmann (eds.), *Foreign Trade in the Present and a New International Economic Order* (1988), p. 27.

<sup>110</sup> Cf. F. Roessler, 'The Constitutional Function of the Multilateral Trade Order', in: M. Hilf and E.-U. Petersmann (eds.), *National Constitutions and International Economic Law* 53 (1993). Cf. W.M. Corden, *Trade Policy and Economic Welfare* (1974); Cf. R. Blackhurst, N. Marian and J. Tumlrir, *Trade Liberalization, Protectionism and Interdependence* (1977). Cf. E.-U. Petersmann, *Constitutional Functions and Constitutional Problems of International Economic Law* (1991).

reduce economic gains.<sup>111</sup> As policy instruments become more trade distorting, the limitations which GATT law imposes on their use become more strict. Tariffs are preferred to global non-discriminatory quotas and global non-discriminatory quotas are preferred to country-allocated quotas.<sup>112</sup> GATT law offers numerous ways to pursue economic and social policy in a responsible and effective manner. When a specific industry needs protection, Article XVI:1 GATT permits the use of certain production subsidies. In addition, tariffs may be renegotiated.

According to the Community principle of proportionality, the means used by the Community institutions must be in proportion to their purpose. The principle requires limiting restrictions of individual freedoms to the minimum necessary to achieve the stated objective. To determine what is required and proportionate to achieve economic objectives without unduly restricting individual freedoms, an analysis of the economic efficiency and effects of alternative legal regulations is required. GATT law offers a standard against which efficiency can be measured. The Court's justification of harmful trade policy instruments does not make any sense from an economic point of view. In the *Banana Case*, the Court merely observed that other means were "conceivable". However, it should have required the Commission to explain in detail why the German government's alternative was not feasible. Although the Community institutions are under the obligation to fully inform traders, and indeed the public at large, which entails an obligation to provide information on the costs and benefits of alternative protective measures, the Commission always has refused to make such cost-benefit analyses.<sup>113</sup> The Court of Justice permits the Community legislature to take protective measures as it sees fit and it does not address in any meaningful manner the question whether alternative, less harmful measures would have sufficed.

#### 4. The Principle of Undistorted Competition

Hoekman and Mavroidis note that "while free trade may be not sufficient to guarantee competitive conduct on individual markets, it is an efficient means of fostering competition.

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<sup>111</sup> See Petersmann, *supra* note 68, at 57.

<sup>112</sup> See Petersmann, *supra* note 68, at 231.

<sup>113</sup> See, e.g., Answer to Parliamentary Question 1289/84, OJ C 113/4 (1985).

One of the fundamental objectives underlying the GATT can therefore be argued to be competition".<sup>114</sup> Trade liberalization within the WTO framework "aims at promoting import and export competition and pursues objectives complementary to those of competition policies for domestic markets".<sup>115</sup> However, the WTO legal system does not specifically address competition policy.<sup>116</sup> The ITO Charter did contain a chapter on 'restrictive business practices', but it was not included in the General Agreement. It is, however, generally recognized that the WTO could deal with anti-competitive actions taken or allowed by governments, since these actions could be considered non-violation cases.<sup>117</sup> Nonetheless, it often has been suggested that multilateral negotiations in the WTO context should aim at drafting specific common competition rules.<sup>118</sup>

Petersmann notes that important constitutional questions arise from the interaction between trade policy and competition policy. Both trade liberalization and competition policy protect the consumer's interest in low prices, the taxpayer's interest in efficiency, and the producer's interest in equal conditions of competition. These constitutional goals cannot be accomplished if governments continue to restrict domestic competition and redistribute domestic income by means of import restrictions.<sup>119</sup> Could the Court of Justice, in the *Banana Case*, have construed the Community principle of free competition in conformity with the corresponding GATT principle? Francis Snyder has explained that the Community concept of 'distortion of competition' has divergent meanings and reflects conflicting ideologies.<sup>120</sup> If the establishment of common market regimes is viewed as primarily directed at trade

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<sup>114</sup> See B.M. Hoekman and P.C. Mavroidis, 'Competition, Competition Policy and the GATT', 17 *The World Economy* 121 (1994), p. 124.

<sup>115</sup> See E.-U. Petersmann, 'International Competition Rules for the GATT-MTO World Trade and Legal System', 27 *J.W.T.* 35 (1993), p. 37.

<sup>116</sup> Jackson has described the lack of treaty rules on the subject as "one of the most important gaps in the structure of international economic relations". See J.H. Jackson, 'Statement on Competition and Trade Policy before the U.S. Senate Committee on Judiciary, 18 June 1992', 26 *J.W.T.* 111 (1992), p. 111.

<sup>117</sup> See Jackson, *supra* note 116, at 115; see also Hoekman and Mavroidis, *supra* note 114, at 144.

<sup>118</sup> See, e.g., L. Brittan, *European Competition Policy: Keeping the Playing Field Level* (1992), p. 108. In July 1993 a private working group submitted a Draft International Antitrust Code to the GATT.

<sup>119</sup> See Petersmann, *supra* note 115, at 38.

<sup>120</sup> See F.G. Snyder, 'Ideologies of Competition in European Community Law', 52 *The Modern Law Review* 149 (1989), p. 149.

liberalization within the European Community, 'distortion of competition' may be defined as 'any restriction of free trade', and external aspects of these regimes must be considered solely within the scope of GATT law. If, however, common market regimes are not just considered market policy but also a form of structural or regional policy, then free trade could be said to amount to unfair competition. In addition to producer support, import restrictions might be considered necessary.<sup>121</sup> Economic organizations, governments in which importers' and exporters' interests predominate, multinational marketing firms, and large producers integrated into the import or export trade, are most likely to take the first view. Small producers for whom high producer prices are essential to continue their business will probably take the second view.<sup>122</sup>

Although the sentiments of small producers are understandable, they will have to understand and accept that assistance can be granted only in a non-distorting, or the least-distorting manner, which happens to entail observance of GATT law. Subsidy addiction can no longer be condoned, particularly in view of the continuing enlargement of the European Community. The Community simply can no longer afford extravagant subsidization. The system of direct income transfers, part of the MacSharry Reforms, will help the European farmers adjust to the new era. As noted previously, the WTO does not forbid its members to pursue structural policies. It only wants to stop them from using harmful policy instruments to achieve the stated objectives. Structural or regional policies can be pursued effectively while adhering to GATT law. The Court of Justice should draw conclusions from the fact that Article 3a(1) EC prescribes that economic policy must be conducted in accordance with the principle of an open market economy with free competition. The concept of free and fair competition entails obeying the rules of GATT.

### 5. The Principle of Legal Certainty

Just like the right to property and the freedom to trade, the principle of legal certainty is one of GATT's underlying principles: trade policy must be conducted on the basis of the rule of

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<sup>121</sup> See Snyder, *supra* note 120, at 158-161.

<sup>122</sup> See Snyder, *supra* note 120, at 173.

law.<sup>123</sup> The WTO provides the legal framework for the consistent conduct of trade policy by members. This legal framework brings security and predictability to the world trading system. Security and predictability, often acknowledged to be basic aims of GATT,<sup>124</sup> are further advanced by the GATT principle of transparent policy-making expressed in both Article II and Article X. The latter provision specifically states that: "Laws, regulations, judicial decisions and administrative rulings of general application, (...), shall be published promptly in such a manner as to enable governments and traders to become acquainted with them". The notification requirement, the importance of which was again emphasized in the Uruguay Round, also promotes security and predictability. In addition, GATT's principle that trade policy must be conducted on the basis of tariffs instead of quantitative restrictions, thereby distorting the price mechanism as little as possible, promotes transparency since tariffs are more difficult to manipulate than non-tariff barriers.<sup>125</sup> To meet the legitimate demands of traders in today's integrated world, there seems to be no other alternative than to adopt a rule-oriented approach in international economic affairs. International trade law prescribes the rules for the foreign trade policy game and provides for an equivalent input from the various forces in society: consumers, corporations, parliaments, trade unions, and trade policy officials. These rules enable citizens to rely upon the stability and predictability of governmental action.<sup>126</sup>

GATT's rule-oriented approach resembles and reflects principles that are codified in the national constitutions of modern democracies, such as the principles of legal certainty and legitimate expectations. When trade policy measures are transparent and predictable, the transaction costs of traders are reduced triggering new investments. In the *Banana Case*, the Court of Justice should have construed the Community principle of legal certainty in conformity with the corresponding GATT principle. It would have given the Commission and Council the important message that they cannot simply ignore the Community's GATT-consolidated tariff bindings and discriminate against third countries when they consider this necessary. It is essential that the Court of Justice urge the institutions to make use of the available WTO procedures whenever protection cannot be avoided. Only the Court can stop

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<sup>123</sup> See Petersmann, *supra* note 68, at 225.

<sup>124</sup> See, e.g., *United States - Manufacturing Clause*, BISD 31S/74, report adopted on 15 May 1984.

<sup>125</sup> See Petersmann, *supra* note 68, at 222.

<sup>126</sup> See Jackson, *supra* note 104, at 87/88.

the institutions from endangering the world trading system, and it should do so, if not for the sake of the system as such, then at least for the sake of the Community and its traders. Did the Commission or the Council, at any stage of drafting the proposal for, or negotiating the adoption of, Regulation 404/93, reflect on whether or not possible infringements of GATT law would affect the market access agreements concluded in the framework of the Uruguay Round? Why would the United States open up its markets for Community exporters, when the Community just violates trade agreements whenever it feels like it?

### *E. Individual Rights and Community Preference*

One would expect the Court of Justice to perceive its task under Article 164 of the EC Treaty so seriously that flagrant infringements of fundamental rights through Community legislation simply cannot occur. The way in which it dealt with the German government's claim that provisions of Title IV of Council Regulation 404/93 violated fundamental rights of Community traders puts this expectation into doubt. The strong criticism expressed in the literature confirms that the *Banana* Case is not atypical. The general reproach leveled at the Court appears to be that, in reality, the *Hauer* test is a farce. It is not a test performed in any meaningful way. The Court never seems to have had much difficulty in finding general principles, but when it comes to determining whether the public interest is pursued, the Court generously allows the Community legislature *carte blanche*. In all cases which are not sheer trivial on their facts, measures correspond to objectives of public interest pursued by the Community when the Council says they do. Measures are proportionate when the Council claims, without providing any evidence whatsoever, that other measures would have been too burdensome for the Community budget. Measures never can encroach upon the substance of an individual right.<sup>127</sup> Traders simply cannot expect the Community to observe their rights when the 'grand design' is at stake. Is there reason to doubt the Court's judicial credibility?

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<sup>127</sup> Other notable cases in which traders were denied protection for the sake of the 'public interest' were, e.g., Case 59/83 *Biovilac v. European Economic Community*, [1984] E.C.R. 4057; Case 250/84 *Eridania zuccherifici nazionali v. Cassa congraglio zucchero and the Italian Ministries of Finance and Treasury*, [1986] E.C.R. 117; Joined Cases 133 to 136/85 *Walter Rau Lebensmittelwerke v. Bundesanstalt für landwirtschaftliche Marktordnung*, [1987] E.C.R. 2289; Case 234/85 *Franz Keller*, [1986] E.C.R. 2897; Case 265/87 *Hermann Schröder Kraftfutter v. Hauptzollamt Gronau*, [1989] E.C.R. 2237; Case C-359/89 *SAFA v. Amministrazione delle Finanze dello stato*, [1991] E.C.R. I-1677; Joined Cases C-143/88 and C-92/89 *Zuckerfabrik Süderdithmarschen v. Hauptzollamt Itzehoe and Zuckerfabrik Soest v. Hauptzollamt Paderborn*, [1991] E.C.R. I-415.

To realistic 'Court-watchers' it will come as no great shock that the Court probably did not develop its fundamental rights doctrine out of sincere concern for a lack of adequate protection of the individual. Joe Weiler has explained that when the *Van Gend & Loos* and *Costa v. ENEL* judgments created the "new legal order" and turned the Treaty into a "surrogate constitution", the Court's own self-perception changed. No longer did it see itself as an international tribunal determined to maintain the autonomy of the system it oversaw, but rather as a constitutional court of a supranational legal order determined to maintain the integrity, unity, and uniformity of the system it had evolved.<sup>128</sup> Adopting a teleological approach to the interpretation of the Rome Treaty, the Court of Justice took an active role in the furtherance of European integration. *Stauder*, *Nold*, and *Internationale Handelsgesellschaft* became, in the political circumstances of the late 1960s and early 1970s, an inevitable sequel to *Van Gend & Loos*, *Costa v. ENEL*, and their progeny. Instead of emerging from a "benevolent interest in human rights", Weiler argues, these judgments had to defend the concept of supremacy which was threatened because of the inadequate protection of fundamental rights in the Treaty. Thus, it is more than likely that the Court developed its human rights doctrine to protect the integrity of the Community legal order rather than the individual. It is therefore doubtful whether the Court ever will be willing to prefer the individual to the Community in a case where both fundamental rights and an important Community policy are at stake. The Court may find itself in difficult policy dilemmas trying to reconcile the conflicting purposes of a higher law of fundamental rights in the Community.<sup>129</sup> It might be reluctant to thwart an important Community policy by favouring an individual whose rights were allegedly violated. Furthermore, since Community legislation is the outcome of such a tortuous process, the Court might be unwilling to overturn it unless absolutely compelled. Although the Court has, of course, struck down numerous legislative measures as being incompatible with the Treaty, many of these were of a technical nature, or at least did not interfere with fundamental Community policies.<sup>130</sup> The main issue therefore is not "the fear of excessive zeal in asserting individual rights but

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<sup>128</sup> See Weiler, *supra* note 41, at 1118/1119. This judicial activism has been most strongly criticized by Hjalte Rasmussen. Rasmussen doubts whether the Court's activism was legitimate. See H. Rasmussen, *On Law and Policy in the European Court of Justice: A Comparative Study in Judicial Policymaking* (1986). He notes, for example, that "it is widely known but rarely recorded in print that even firm believers in a federal Europe occasionally are baffled by the Court's strong and bold pro-Community policy preference". *Ibid.*, p. 3.

<sup>129</sup> *Ibid.*

<sup>130</sup> *Ibid.*



fear of the opposite: a reluctance of the Court to exercise a sufficiently robust individual protection policy. If there is distrust it is not a distrust of a Court overreaching itself in protecting the individual, but of a Court not reaching far enough".<sup>131</sup>

Indeed, in interpreting the law, the Court appears to be 'guided' by a principle of 'Community preference'. Sure, the Court can be generous where granting a right to the trader is negligible from a policy point of view, but when it really matters the trader cannot win.<sup>132</sup> Sharpston rightly notes that the Court of Justice "has a tendency to begin by formulating a broad principle on which it seems as though traders may successfully rely; and then going on to whittle down its potential applicability so that, in the end, the trader loses".<sup>133</sup> This conclusion is confirmed by Andrew Clapham: "Although the Court has increasingly referred to the Convention, the European Social Charter, international treaties and constitutional principles and traditions, the rights contained therein have hardly been developed by the Court, and they have rarely been relied on to give concrete protection to an individual".<sup>134</sup> When there is no serious balancing of interests, the *Hauer* test becomes a farce. The test seems devised solely to give the impression that the Court will seriously assess the matter. In reality, such assessment does not happen. This is precisely what Jason Coppel and Aidan O'Neill mean when they argue that the Court simply has "manipulated the usage of fundamental rights principles, endowing these principles with just enough significance in Community terms to allow for the triumph of the Community will".<sup>135</sup> Fundamental rights are subordinated to the objective of closer economic integration; the high rhetoric of fundamental rights protection is no more than a vehicle for the Court to extend the scope and impact of Community law.<sup>136</sup>

Since the Court has positioned itself at the wheel of the integration carriage, it is debatable

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<sup>131</sup> See Weiler, *supra* note 41, at 1109.

<sup>132</sup> See Sharpston, *supra* note 83, at 113.

<sup>133</sup> See Sharpston, *supra* note 83, at 160.

<sup>134</sup> See A. Clapham, *Human Rights and the European Community: A Critical Overview* (1991), p. 50.

<sup>135</sup> See Coppel and O'Neill, *supra* note 35, at 683.

<sup>136</sup> See Coppel and O'Neill, *supra* note 35, at 692. For a sophisticated rebuttal, see, J.H.H. Weiler and N.J.S. Lockhart, 'Taking Rights Seriously' Seriously: The European Court and its Fundamental Rights Jurisprudence', 32 C.M.L. Rev. 51/579 (1995), in which the authors contest Coppel and O'Neill's "sweeping and damaging empirical statements about the outcome of human rights cases" (at 623).

whether it has succeeded in maintaining its undisputed independence from the other branches. As the dynamic champion of European integration, it does seem to judge *in re sua*. The *iudex in causa sua* effect would seem even stronger when the contested Community measure is a measure of foreign trade policy. In these cases, a static and inward-oriented approach reveals itself, which is disappointing to those who had expected and hoped for a more 'open mind' in a Court which matured in the liberal tradition. It is discouraging to see how, in balancing Community public interest and individual rights, the Court automatically assumes that the 'protective' measure in question has been taken in the interest of the Community and that the individual interest deserves no protection or at least has to yield to the Community interest. The Court appears to support a 'secret bond' between the Commission and the Council, on the one hand, and import-competing Community producers, on the other. Since these producers are asked to sacrifice for the sake of the completion of the internal market, they will receive extra protection from 'third country competition' in return. They will not be exposed too much to foreign competition. The judges of the European Court are prepared to close their eyes for the sake of European integration. The protective measures shall be upheld, whether or not they are in violation of international law and/or fundamental rights.

#### *F. Discretionary Powers and Community Preference*

The main problem in disputes concerning foreign trade measures is the abundant discretionary power which the Court of Justice allows the EC executive and legislature. In discussing the problem of controlling the exercise of discretionary powers, it is important to distinguish between two concepts which are often used interchangeably: 'power of appraisal' and 'discretionary power'. Power of appraisal exists when the factual circumstances which the legal provision in question lays down as a requirement for the lawful exercise of the powers conferred are described in vague or general terms which allow different assessments as to whether all necessary conditions are satisfied. Discretionary power, on the other hand, refers to the situation where a legal provision only defines the scope of the powers of the public authority using a general formula which describes both subject matter and

objective.<sup>137</sup> An example of a power of appraisal is the provision of Article 92(3)(b) of the Treaty which states that compatible with the common market may be considered "aid to promote the execution of an *important* project of common European interest or to remedy a *serious* disturbance in the economy of a Member State". An example of an discretionary power can be found in Article 51 of the Treaty which provides, *inter alia*: "The Council shall (...) adopt such measures in the field of social security as are necessary to provide freedom of movement for workers...". The subject matter is social security and the objective is the free movement of workers. In Article 51, as in many other provisions, both a power of appraisal and a discretionary power can be detected.

Although the distinction is often blurred, it remains important to keep the two concepts apart. If there is a power of appraisal there is only limited delegation of powers. The public authority has a freedom of action only when the necessary conditions are fulfilled and, if they are, it must act in a designated manner. In case of discretionary power, the public authority may choose which course of action, out of a number of possible courses of action, it prefers to take. This means that judicial review of the exercise of a power of appraisal may be extensive whereas a review of a discretionary power can be only marginal; that is to say, only intended to ensure that the discretionary power is not exercised in an arbitrary manner. The public authority's freedom of choice should be respected.<sup>138</sup> In the view of the Court, this freedom of choice entails that contested measures may be declared illegal only when it is established that there was a 'manifest error of judgment' in the choice of means to attain the objective. The Community institutions usually will be allowed to make overall assessments of situations, even if it subsequently might appear that the elements on which these assessments were based were debatable from an economic point of view.<sup>139</sup> The Court wants to make perfectly clear that individual traders cannot dictate to the Community institutions what their policy choices should be.<sup>140</sup>

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<sup>137</sup> See Mertens de Wilmars, *supra* note 82, at 2/3. See also J.H.J. Bourgeois, 'Trade Policy-Making Institutions and Procedures in the European Community' in: M. Hilf and E.-U. Petersmann (eds.), *National Constitutions and International Economic Law* 175 (1993), p. 177: [power of appraisal] "refers to situations where the exercise of a given power is made conditional on certain economic facts, the assessment of which itself implies discretion".

<sup>138</sup> See Mertens de Wilmars, *supra* note 82, at 4.

<sup>139</sup> See, e.g., Case 43/72 *Merkur v. Commission*, [1973] E.C.R. 1055, at 1074/1075 (paragraph 24).

<sup>140</sup> See Sharpston, *supra* note 83, at 110.

Mertens de Wilmars, former judge and President of the Court of Justice, has described how the Court has laid down three interpretative guidelines or principles in order to determine whether the Community legislature has crossed the boundaries of its discretionary powers and has acted arbitrarily. The three principles which the Court employs in its interpretation of legal provisions to determine the extent of allowable discretionary power are the principle of unity of the market, the principle of solidarity and the principle of Community preference.<sup>141</sup> The principle of unity of the market calls for a systematic interpretation of Community law ensuring the completion of the internal market. This principle is reflected in Article 2 EC which defines the basic objective of the Community, namely the establishment of a common market and an economic and monetary union. For this purpose, as Article 3a(1) provides, the Member States and the Community must, *inter alia*, adopt an economic policy which is based on the close coordination of Member States' economic policies. The principle of solidarity has two components. The first is the obligation laid down in Article 5 EC involving a duty of the Member States to take all appropriate measures to ensure implementation of the Treaty and to abstain from any measure which could jeopardize the attainment of the objectives of the Treaty, and the second is the obligation of Member States to accept the sacrifices attached to a membership which also has many advantages.<sup>142</sup> The principle of Community preference, also referred to above (in a more general sense) in the context of the judicial protection of fundamental rights, means that, in interpreting the law, the Court feels that priority is to be given to intra-Community trade over trade with third countries.<sup>143</sup> The principle is reflected, for example, in Article 44(2) EC which provides that "minimum prices shall not be applied so as to form an obstacle to the development of a natural preference between Member States". In the *Banana Case*, all three principles were utilized to some extent.

As the case concerned a regulation providing for a common organization of the market, the

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<sup>141</sup> See Mertens de Wilmars, *supra* note 82, at 9. The principle of solidarity and the principle of unity of the market are also elements of one of the Court's more general methods of interpretation commonly referred to as teleological or functional, or expressed with the words 'effet utile', which is used to prevent unacceptable consequences to which literal interpretation might lead, to promote the objective for which the rule was made, and/or to fill gaps which would otherwise arise. See Schermers and Waelbroeck, *supra* note 3, at 18/19. Again, the distinction may therefore be somewhat blurred.

<sup>142</sup> See Mertens de Wilmars, *supra* note 82, at 9.

<sup>143</sup> See, in particular, Case 270/80 *Polydor and RSO Records v. Harlequin Record Shops and Simons Records*, [1982] E.C.R. 329; see also Case 30/79 *Land Berlin v. Wigei*, [1980] E.C.R. 151.

principle of unity of the market was most obviously visible. The previously existing situation of compartmentalization had to be brought to an end and there really can be no opposition against a Court endorsing that objective. Likewise, one should not raise objections against a Court which calls on Member States to accept occasional sacrifices connected with an overall beneficial membership. However, there should be serious concern when the Court appears to base itself on 'Community preference'. In that case, it utilizes a tool which is not only clearly old-fashioned and obviously politically tainted, but which also jeopardizes the acceptance by Member States of one of the other tools, the fundamental one founded on the basic principle of solidarity. The principle of Community preference significantly hampers the European Community in its preparation for the global world economy. How long will Member States continue to accept political compromises, although they realize that these deals hurt the European economy and badly prepare European industry for the next century? How long will Member States continue to accept economic sacrifices which have no basis in economic theory?

In the *Banana Case*, the Court held that no economic operator can claim a right to property in a market share which he held at a time before the establishment of a common organization of a market, since such a market share constitutes only a momentary economic position exposed to the risks of changing circumstances. A trader can never claim a right that an existing situation which is capable of being changed by decisions of the Community institutions within the borders of their discretionary powers will be maintained, in particular if the existing situation is inconsistent with the rules of the common market. The Court thereby applied the rule first mentioned in *Nold* that fundamental rights cannot protect a company's "mere commercial interest or opportunities, the uncertainties of which are part of the very essence of economic activity". As noted above, Advocate General Trabucchi had claimed in *Nold* that the protection of public interest may restrict the exercise of trading activity, since no constitution can ever precisely specify the rules needed to satisfy the changing requirements of economic reality. The question is, however, whether the Community legislature should not obey fundamental rights of traders in the foreign trade area when the Court has recognized higher rules, prescribing how trade policy must be conducted, as an integral part of Community law. The constitution of the European Community does not precisely specify the rules needed to satisfy the changing requirements of economic reality, because such specificity is both uncalled for and impossible. However, it does refer to an international framework within which the Community institutions must

act. The risk that these institutions simply cannot be bothered to obey the rules of GATT to which they have voluntarily committed themselves is not one of the mere commercial uncertainties which unavoidably characterize all forms of economic activity. It is a risk that EC traders do not have to accept.

The Court of Justice repeatedly has stated that, when examining the lawfulness of the exercise by the Community institutions of their freedom of evaluation, it cannot substitute its own evaluation for that of the competent authorities. It must restrict itself to examining whether the evaluation, *ex post facto*, contained a manifest error. The question whether the rational economic agent has the same perspective of logical analysis as the Court of Justice when it comes to considering a given situation *ex post facto* is therefore an essential one.<sup>144</sup> That the rational economic agent does share this perspective is unlikely, since the Court does not seem to have a standard to measure what exactly constitutes a 'manifest error'. It is a fact that economic agents live in an uncertain world in which changes in the regulatory framework within which they operate are just one further hazard. The WTO legal system, however, makes economic life considerably less uncertain and it is therefore of extreme importance that the Community obeys its rules. In the current situation, the Community institutions are bound by the rules of, for example, GATT but are not under any control of the Court of Justice when it comes to observing these rules. They are permitted to act in an arbitrary manner. The Commission may tell trader X on Thursday that the protective measures desired by him cannot be imposed since such measures would violate GATT law, and trader Y (who has a better lobby behind him) on Friday that (similar) measures will be taken since the Commission feels that such measures are needed. Whether X, Y, both or neither one deserve(s) protection can be rightfully assessed only by reference to the higher law of GATT. The WTO legal system provides for a common framework of superior rules from which can be formulated the right standard to assess trade policy measures.

Mertens de Wilmars has observed that "in tracing the boundary between the lawful and unlawful exercise of a discretionary power the courts have no desire to reach their decisions like a khadi under a tree dispensing justice according to considerations of individual expediency. Since their task is to prevent arbitrariness on the part of others it is right for them, and indeed their duty, to beware of such a trait in themselves, however well-

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<sup>144</sup> See Sharpston, *supra* note 83, at 105.

intentioned it may be".<sup>145</sup> Perhaps there is no conclusive proof for Coppel and O'Neill's contention that the European Court of Justice generally has manipulated the nature and importance of fundamental rights protection for the sake of European economic integration. Probably, the ECJ does not deliberately 'refuse' to take rights seriously. There is, however, as Weiler has admitted, a justified fear of "a reluctance of the Court to exercise a sufficiently robust individual protection policy".<sup>146</sup> The cases in which the Court did protect the fundamental rights of individuals all appear to be rather trivial.<sup>147</sup> In non-trivial cases (admittedly, a vague notion) the Court simply does not protect the individual. Arguably, because it feels it has to uphold legislation which the Commission and the Council view as 'important' or even 'not unimportant'. In the foreign trade field, however, individuals just can't win.<sup>148</sup> In some of these cases, the Court is even prepared to go as far as accepting as true, false information submitted by the Community institutions, even though disputed by the plaintiff.<sup>149</sup> One of the most striking examples is the *Gao Yao* judgment.<sup>150</sup> In this case, Advocate-General Lenz had held an anti-dumping regulation void, *inter alia*, on the ground of infringement of the rights of the defense, specifically the right to a fair hearing in that essential considerations in the calculation of normal value were not brought to the plaintiff's attention. The Advocate-General described the astounding arguments advanced to establish damage. For example:

Both the Council and the Commission maintain in their respective regulations that the sales volume of the EC manufacturers on the Community market has declined. However, [the challenged regulation] sets out the figures for such sales in the period [assessed] and they show that sales have not declined, but increased - considerably. It is completely inexplicable in view of these figures, which they themselves have calculated, how the Community institutions could claim that sales by the EC manufacturers declined.<sup>151</sup>

The Advocate-General even presented further proof that the figures used by the institutions

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<sup>145</sup> See Mertens de Wilmars, *supra* note 82, at 8.

<sup>146</sup> See Weiler, *supra* note 41, at 1109. See also note 131.

<sup>147</sup> See Weiler & Lockhart, *supra* note 136, at 84-94. The authors argue that: "Some of the cases might seem trivial on their facts though the legal victory for human rights may be very important in other contexts. The opposite could also be true" (at 94).

<sup>148</sup> *Sofraimport* is a rare exception, but on the facts a rather insignificant case. See *supra* note 97 and accompanying text.

<sup>149</sup> See, e.g., Case 112/80 *Anton Dürbeck v. Hauptzollamt Frankfurt am Main-Flughafen*, [1981] E.C.R. 1095, in which the Commission misled the Court regarding a GATT panel report.

<sup>150</sup> Case C-75/92 *Gao Yao (Hong Kong) v. Council*, Judgment of 7 July 1994, not yet reported.

<sup>151</sup> AG Opinion paragraph 92 (emphasis added).

were simply wrong. As he pointed out, the internal document submitted by the Council marked:

in addition to a reference to the place in which the figures are to be found in [the challenged regulation], the word 'error'. There is then in every case a new line showing other figures for 1989; on the right of those figures appears the word 'real'. Manifestly, the institutions themselves realized that the figures which they were using were wrong.<sup>152</sup>

The Court will draw the necessary conclusion from the fact that the institutions apparently sought to suppress an error which they made ... it makes it appear desirable quite generally to investigate very thoroughly the Community institutions' activities in the sphere of anti-dumping law whenever actions are brought.<sup>153</sup>

The Court, however, did not draw that conclusion. Although *Gao Yao* was a case clearly admissible on a straightforward application of the Court's own restrictive doctrine, the Court perfunctorily dismissed on locus standi grounds.

In determining the boundaries of discretionary powers in trade policy-making, the Court usually appears to endorse the arbitrary measures of the EC executive and legislature without any basis in substantive law. It thereby completely neglects two fundamental provisions of Community law: Articles 3a and 110 of the EC Treaty. Article 3a(1) provides, *inter alia*, that the Community must conduct economic policy in accordance with the principle of an open market economy with free competition. Article 110 EC states, *inter alia*, that "by establishing a customs union between themselves Member States aim to contribute, in the common interest, to the harmonious development of world trade, the progressive abolition of restrictions on international trade and the lowering of customs barriers". Both provisions clearly limit the exercise of discretionary powers by the Community institutions in the area of economic and trade policy making. They limit the possible courses of action to be taken by the institutions in these related fields. Under Article 164 of the EC Treaty, it is the task of the Court of Justice to ensure that the law is observed in the interpretation and application of the Treaty and, evidently, the Court also must review the legality of Community acts in the area of foreign trade policy where discretionary powers are extra broad. This is simply part of its task under this provision and certainly not an undue interference with policy decisions of the Community legislature.<sup>154</sup> The institutions' exercise of discretionary powers

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<sup>152</sup> AG Opinion paragraph 94.

<sup>153</sup> AG Opinion paragraph 95.

<sup>154</sup> Cf. G.M. Berrisch, 'Zum Bananen-Urteil des EuGH vom 5.10.1994 - Rs. C-280/93, Deutschland./Rat der Europäischen Union', EuR 461 (1994), p. 467. Cf. J. Schwarze, *Europäisches Verwaltungsrecht* (1988), p. 838.



is restricted by the membership of the Community in the WTO. It is clear that, as a matter of principle, there should be a presumption of legislative freedom. The Community legislature normally should be left with its hands untied. However, by binding itself to GATT the Community has given up the right to use certain policy instruments. It has voluntarily tied at least one hand to the mast of GATT. Therefore, the Court of Justice ought to intervene when the Community institutions do utilize an illegal instrument.

### *G. Conclusion*

In balancing public interest and individual rights in the foreign trade field, the Court of Justice faces an unique dilemma. The way out of the dilemma is for the Court to admit, first of all, that Community legislation can be manifestly erroneous and can infringe the substance of individual rights, also when important policies are at stake. The Community and the Member States have committed themselves at the international level to opt only for first-best policy instruments because they know that first-best policy instruments best serve the public interest. These policy instruments provide for the quickest and least harmful route to economic welfare. Policy instruments which are not compatible with GATT law therefore must be considered, *per definition*, manifestly erroneous. The Court would thereby also better protect the individual rights of Community traders. It is respectfully submitted that thusfar it has not done a proper job. For the sake of the political balance which in the European Community is so difficult to achieve, it has failed to strike an acceptable balance between protection of individual rights and protection of the public interest. For if simply taking away market shares from private traders who have worked for decades to build up their business is not a violation of the very substance of the right to property and the right to freely pursue a trade or profession, what is? Taking away market shares is not a change in economic circumstances which is part of economic life, but an arbitrary and harmful act of government intervention in the proper functioning of the market economy of the worst kind. And if opting for a second-best policy, when a first-best policy with less harmful effects is readily available and can be easily financed, is not a violation of the core of the principle of proportionality, what is? In balancing public interest and individual rights in the area of foreign trade, the Court of Justice should take a firmer stance. In the current situation, neither the public interest nor individual rights are protected. Both the public at large and private traders are entirely at the mercy of Commission and Council, with no factual control

whatsoever by the Court of Justice. The Court ought to realize that 'Community public interest' is an amorphous concept, a concept which cannot exist independently from the disclosed preferences of private traders in the Community. Only the private trader: "can experience utility and disutility, rank alternative states of welfare, formulate beliefs concerning ought-to-bes, make his way through the thicket of risk and uncertainty in the direction of an expected objective the nature of which it may be impossible for him fully to articulate to others. That which is sought for, both in politics and economics, cannot in the circumstances be anything that exists independently of the attitudes and interests, preferences and purposes of the discrete [private traders] who make up the society".<sup>155</sup> Both the public interest and individual rights can be served and protected through simple enforcement of the law of GATT.

It was perfectly clear to the Commission that a common organization of the banana market on a *dirigiste* basis was highly risky. As Tilgenkamp acknowledged: "Nobody can tell where we are going in this banana market. It is completely new. It is new for everyone. It is new for us in terms of management".<sup>156</sup> The basic question is: is such management needed and wanted? Is it not better to let the market mechanism function freely? Apparently, such functioning is politically impossible in the view of the Commission. "I am not a protectionist", says Alexander Tilgenkamp, "I am more liberal in terms of thinking. But after three years of intense work, the solution cannot be very far from the Commission proposal. There is no other solution (...). If you see the letters that land on my desk every day asking for more protection, you would realize that we have been very liberal with our import regime".<sup>157</sup> But what about the Court of Justice, Mr. Tilgenkamp? "I have no doubt about the issue before the European Court of Justice. It was complex enough and the Court knows that".<sup>158</sup>

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<sup>155</sup> See J.M. Buchanan, *Liberty, Market and State* (1986), p. 249. For further analysis see Chapter X.

<sup>156</sup> See *Eurofruit Magazine* (October 1993), p. 18.

<sup>157</sup> *Ibid.*

<sup>158</sup> *Ibid.*

## IX

### *The Political Economy of EC Foreign Trade Policy*

*The sovereign is completely discharged from a duty, in the attempting to perform of which he must always be exposed to innumerable delusions, and for the proper performance of which no human wisdom or knowledge could ever be sufficient; the duty of superintending the industry of private people, and of directing it towards the employments most suitable to the interests of society.<sup>1</sup>*

#### *A. Introduction*

ONE of the main issues in the political economy of international trade concerns the question of what motivates governments in their foreign trade relations. Analysis of this aspect of government behaviour also may be divided into two separate issues, namely a conceptual issue and a methodological one. The conceptual issue involves a definition of a government's policy objectives. The methodological issue involves a choice between two possible levels of analysis. The first possible level of analysis is the system level and the second is the unit level. At the system level of analysis, the State is considered a rational and unitary actor. Unit level analysis, on the other hand, studies the strategic interactions among all domestic actors, inside as well as outside the government, which may influence a government's actions. This chapter will first address the conceptual issue of defining the Community interest. Like all governments, the EC administration is supposed to act in the public interest. Its objective must be to ensure the economic welfare of the European Community and the prosperity of the citizens within the borders of the Community. The standard for evaluating EC trade policy which is used in this chapter is thus the traditional utilitarian one, economic welfare. The central question will be: can the Community act as a distinctively useful agent in (national and international) markets on behalf of all its constituents? Or, in other words, can the Community do something for its constituents that they cannot do for themselves, either individually or in free association, as firms? It is clear that, like any government, the Community can arrange useful market interventions on behalf of some of its constituents at

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<sup>1</sup> See Adam Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations* (1776), in the edition of R.H. Campbell, A.S. Skinner and W.B. Todd, Clarendon Press, Oxford (1976), at IV.ix.51.

the expense of others, but can it act on behalf of *all* of its constituents?<sup>2</sup> Subsequently, the methodological issue of choosing between possible levels of analysis will be examined. It will be argued that mere system level analysis does not suffice to explain government behaviour. Pressure exerted by domestic interest groups has a significant impact on policy decisions.

### *B. Mercantilism*

In 1549, a book appeared in England entitled *The Discourse of the Common Weal of this Realm of England* in which the author explicitly cautioned against importation of foreign goods: "we must alwaies take care that we bie no more of strangers than we sell them ... for so wee sholde empoverishe owr selves and enriche them".<sup>3</sup> The author's message was clear. When we buy more from foreigners than we sell to them, they become rich and we become poor. This proposition, seemingly based on pure logic, appeared to have a considerable power of attraction and a motley crew of merchants and politicians followed in the author's track. In writings and pamphlets they aired their ideas concerning the conditions which foreign economic policy had to satisfy in order to bring economic welfare to the country. In 1664, the merchant Thomas Mun wrote: "the ordinary means to encrease our wealth and treasure is by Fforraign Trade, wherein we must ever observe this rule; to sell more to strangers yearly than we consume of theirs in value".<sup>4</sup> Sir Matthew Decker did not have any doubts on this point either. In his *Essay on the Causes of the Decline of the Foreign Trade*, which appeared in 1739, he declared: "Therefore if the Exports of Britain exceed its Imports, Foreigners must pay the balance in Treasure and the Nation grow Rich. But if the Imports of Britain exceed its Exports we must pay the Foreigners the Balance in Treasure and the Nation grow Poor".<sup>5</sup> This doctrine, which later was to be called 'mercantilism', thus proceeded from the assumption that the wealth of a nation is something that is obtained at the cost of another nation. Since we can serve our country's economic interests only at the expense of foreign interests, our main objective must be to sell more to foreigners than we buy from them. Only

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<sup>2</sup> See J. D. Richardson, 'The Political Economy of Strategic Trade Policy', 44 *International Organization* 107 (1990), p. 110. Both national and international markets are referred to because industrial policy and trade policy are two sides of the same coin.

<sup>3</sup> See C. Wilson, *Mercantilism* (1958), p. 11.

<sup>4</sup> See Wilson, *supra* note 3, at 11.

<sup>5</sup> See Wilson, *supra* note 3, at 12.

by adhering to this basic principle will the domestic stock of gold grow. H.G. Johnson aptly has described 'mercantilism' as follows:

Like any other body of thought and group of thinkers important enough to merit being called an "-ism", mercantilism was a collection of often mutually contradictory ideas expressed with varying degrees of clarity by men of widely varying levels of intelligence and reasoning power. Reduced to its bare essentials, however, and doing far less than justice to the percipience of many of the writers concerned, it amounted to two propositions: that the wealth of a country consisted in the quantity of precious metals in circulation or in hoards within its borders, and that the way to increase that wealth was to secure a surplus on the balance of payments, usually identified with a balance on merchandise trade, by policies of import substitution and export promotion.<sup>6</sup>

The mercantilists advanced only vague notions, certainly not well-founded theories derived from systematic analysis. In that respect, they could not match the scholastici of the Middle Ages.<sup>7</sup> Nonetheless, their epistles were taken seriously by the persons responsible for foreign economic policy. The mercantilist representation of affairs influenced these policy makers considerably.<sup>8</sup> The desired export surplus was pursued with the help of a broad assortment of government measures. Apart from direct import restrictions, numerous indirect measures were devised and executed, for example, the introduction of a maximum wage to keep production costs of goods destined for export as low as possible.<sup>9</sup> The following example shows how vague ideas and policy could come together.<sup>10</sup>

In the year 1622 a committee of merchants and government officials was established in England and instructed to give advice on the issue of massive unemployment in the cloth industry. This unemployment had been caused by the failure of the so-called Cockayne Plan, a plan aimed at building up an English industry of raw cloth refinement in order to compete with the Dutch. These Dutchmen had been buying raw cloth in England, refining it in their own country and selling it again, thus managing to rake off a disproportionate part of the total available profit in this branch of trade. For several reasons which do not concern us here, the plan failed. In order to reduce the unemployment which ensued, the committee, with Thomas Mun as one of its prominent members, formulated the policy that would constitute the core of a more general mercantilist policy which would endure for more than

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<sup>6</sup> See H.G. Johnson, 'Mercantilism: Past, Present and Future', 8 J.W.T.L. 1 (1974), p. 3.

<sup>7</sup> See T. Sowell, 'Adam Smith in Theory and Practice', in: G.P. O'Driscoll Jr. (ed.), *Adam Smith and Modern Political Economy: Bicentennial Essays on the 'Wealth of Nations'* (1979), p. 4.

<sup>8</sup> See Wilson, *supra* note 3, at 12.

<sup>9</sup> See Sowell, *supra* note 7, at 4.

<sup>10</sup> The example is borrowed from Wilson, *supra* note 3, at 12-16.

two centuries. The four main points of the 'rescue plan' were: (1) preservation of English raw materials for the English cloth industry by means of a prohibition on the export of wool, in particular on the export to Holland; (2) a prohibition for English merchants to sell Spanish or Turkish wool to the Dutch; (3) reduction of the need to import by means of upgrading the English industry for raw materials; and (4) a prohibition for Dutch fishermen to catch fish off the English coast.<sup>11</sup> In this manner, a strategic attack would be launched on the dominant position of the Dutch in the European economy in general and in the cloth industry in particular. These Dutchmen living in that small country below sea-level had made themselves the richest people in the world simply by trading goods, mainly at the expense of the English. If they would remain devoid of English wool altogether and would no longer be supplied with Spanish and Turkish wool by English shipping companies, England would become self-reliant as regards raw materials and the Dutch shipping industry would be dealt a blow, England surely would be victorious in the economic battle between the two countries.

In England, successive kings and government officials viewed mercantilist policy as the perfect opportunity to enrich the country as well as themselves. Eagerly, they heard the producers' pleas for import restrictions and export subsidies. Usually, the requests were granted. Was it not only fair that the State should protect its producers against the extravagant competition of foreign invaders and that the State should assist them in obtaining a foothold abroad?<sup>12</sup> For the English people, however, this policy was less agreeable. Wages were kept extremely low in order to enable domestic industries to compete with those of foreign countries. Jealousy and mistrust of foreigners constituted the important catalysts for mercantilism, the policy that would lead to the infamous Navigation Acts which reserved the entire trade between England and its colonies for English ships and formed the direct reason for several wars between England and Holland.<sup>13</sup> It was in this atmosphere of nationalism and animosity that the Scottish economist and philosopher Adam Smith made his appearance. Although several authors before him had complained about the excessive government interventions and the growing volume of minute rules and regulations, Smith's criticism was the most comprehensive and, moreover, liberally sprinkled with striking

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<sup>11</sup> This last point needs some clarification. In those days, the basis for Dutch trade was shipping and the shipping industry owed its existence mainly to the profitable herring catch off the coast of England. The Dutch based their right to fish there on Grotius' famous adage 'mare liberum'.

<sup>12</sup> See Wilson, *supra* note 3, at 19.

<sup>13</sup> For example in 1652 and 1665; see Wilson, *supra* note 3, at 14 and 16.

examples. His classic work *An Inquiry into the Nature and Causes of the Wealth of Nations* appeared in 1776. Unhampered by false modesty, he himself called it, in a letter to Andreas Holt: "a very violent attack ... upon the whole commercial system of Great Britain".<sup>14</sup>

Adam Smith felt great anxiety over the wielding of pressure by producers in order to obtain import restrictions. Guilty of this practice were not so much the producers, Smith argued, but rather the politicians who allowed it to happen. Ministers, government officials, and Members of Parliament easily gave in to producers' demands. They were much more concerned with their own popularity than with the standard of living of their people. A simple prey for one industry lobby after the other, their acquiescence encouraged the thought that lobby pressure would lead to results and, consequently, the mercantile system grew.<sup>15</sup> Increasingly, the economy was harmed and the citizens' economic and social situation worsened. For these reasons, Adam Smith strongly criticized "that insidious and crafty animal, vulgarly called a statesman or politician, whose councils are directed by the momentary fluctuations of affairs".<sup>16</sup> In Smith's view, the producers themselves had devised the oligarchic-mercantilist system which in Great Britain had degenerated into a corrupt form of government. The citizen had become the main victim of these practices, especially in his role as a consumer: "It cannot be very difficult to determine who have been the contrivers of this whole mercantile system; not the consumers, we may believe, whose interest has been entirely neglected; but the producers, whose interest has been so carefully attended to".<sup>17</sup> Smith saw that government was manipulated by privileged groups in society and intended to warn against the harmful consequences for the people:

The proposal of any new law or regulation of commerce which comes from this order, ought always to be listened to with great precaution, and ought never to be adopted till after having been long and carefully examined, not only with the most scrupulous, but with the most suspicious attention. It comes from an order of men, whose interest is never exactly the same with that of the publick, who have generally an interest to deceive and even to oppress the publick,

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<sup>14</sup> Letter dated 26 October 1780. Quoted from: A.W. Coats, 'Adam Smith and the Mercantile System', in: A.S. Skinner and T. Wilson (eds.), *Essays on Adam Smith* (1975), p. 228.

<sup>15</sup> This phenomenon characterized by "arguments addressed by merchants to Parliaments and the Counsels of Princes, to nobles and country gentlemen" many years later came to be known under the name 'rent-seeking'. As early as the thirteenth century, export monopolies were formed in England through negotiations with the King. In those days, merchants simply refused to pay taxes on foreign transactions if they did not receive privileges in return. See R.B. Ekelund and R.D. Tollison, *Mercantilism as a Rent-Seeking Society: Economic Regulation in Historical Perspective* (1981), p. 56.

<sup>16</sup> See *The Wealth of Nations*, at IV.ii.39.

<sup>17</sup> See *The Wealth of Nations*, at IV.viii.54.

and who accordingly have, upon many occasions, both deceived and oppressed it.<sup>18</sup>

In Smith's opinion, the interests of the consumer should receive priority over the interests of the producer: "consumption is the sole end and purpose of all production; and the interest of the producer ought to be attended to, only so far as it may be necessary for promoting that of the consumer. The maxim is so perfectly self-evident, that it would be absurd to attempt to prove it".<sup>19</sup> Under the mercantilist regime, producers possessed an almost monopolistic power accorded to them by the government. These producers were able to obtain virtually any protective legislation that they desired. Producers simply were more adept at manipulating politicians than consumers. They flattered the politicians, realizing that "men desire to have some share in the management of publick affairs chiefly on account of the importance which it gives to them,"<sup>20</sup> and made use of their fear of losing popularity. Producers made it perfectly clear to politicians that they would be pilloried in public if they would not comply with the producers' demands. The monopolistic power of producers, Smith stated,

... has so much increased the number of some particular tribes of them, that, like an overgrown standing army, they have become formidable to the government, and upon many occasions intimidate the legislature. The member of parliament who supports every proposal for strengthening this monopoly, is sure to acquire not only the reputation of understanding trade, but great popularity and influence with an order of men whose numbers and wealth render them of great importance. If he opposes them, on the contrary, and still more if he has authority enough to be able to thwart them, neither the most acknowledged probity, nor the highest rank, nor the greatest publick services can protect him from the most infamous abuse and detraction, from personal insults, nor sometimes from real danger, arising from the insolent outrage of furious and disappointed monopolists.<sup>21</sup>

Quite separate from the above considerations, Adam Smith explained how the mercantilist doctrine in fact was based on a serious misconception, namely on an erroneous view of what exactly constitutes the wealth of a nation. Wealth, Smith argued, does not consist in a static gold stock, as the mercantilists liked to believe, but is made up of real goods and services. The wealth of a nation essentially is determined by a variable flow of goods and services.<sup>22</sup> Hence it appears that there is no reason whatsoever to fight over the distribution of the world gold supply. Already in his earlier work, *The Theory of Moral Sentiments* (1759), Smith

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<sup>18</sup> See *The Wealth of Nations*, at I.xi.p.10.

<sup>19</sup> See *The Wealth of Nations*, at IV.viii.49.

<sup>20</sup> See *The Wealth of Nations*, at IV.vii.c.74.

<sup>21</sup> See *The Wealth of Nations*, at IV.ii.43.

<sup>22</sup> See Sowell, *supra* note 7, at 5.



had commented on what he viewed as the peculiar 'international relations' aspect of mercantilism, namely, the resentment and rivalry it caused between nations:

France and England may each of them have some reason to dread the increase of the naval and military power of the other; but for either of them to envy the internal happiness and prosperity of the other, the cultivation of its lands, the advancement of its manufactures, the increase of its commerce, the security and number of its ports and harbours, its proficiency in all the liberal arts and sciences, is surely beneath the dignity of two such great nations. These are the real improvements of the world we live in. Mankind are benefited, human nature is ennobled by them.<sup>23</sup>

The envy between countries surprised Smith because he saw how all countries could prosper by cooperating, that is, by trading with one another on a mutually advantageous basis. Each country, he argued, can become wealthier than it is now by concentrating on improving the efficiency of its own production process.

The most well-founded theoretical attack on mercantilism must be attributed to Smith's close friend David Hume. The idea that a fixed supply of gold can determine the wealth of a nation, Hume asserted, is fundamentally wrong. Any influx of gold will cause a rise of the domestic price level relative to prices abroad. As a result, the importation of foreign goods will increase and thus gold will leave the country again in payment for these goods.<sup>24</sup> Many years later, Von Haberler rightly noted that: "The mercantilists based their whole attitude to problems of commercial policy on the idea that the accumulation of gold meant an increase in the real wealth of a country. This view was, of course, erroneous. But even if there were any sense in trying to increase the amount of gold in circulation, the method they advocated - namely, Government interference with foreign trade - would not in fact produce this result".<sup>25</sup> Yet in spite of the inherent sophistry of mercantilism, its fallacy continued to endure. The most adequate explanation of its endurance has been given by Jagdish Bhagwati who states: "Mercantilism and its legitimization of autarchic protective policies seemed to be only common sense, reminding one that common sense is what makes a person assert that the earth is flat, for that is how it appears to the naked eye".<sup>26</sup>

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<sup>23</sup> See A. Smith, *The Theory of Moral Sentiments* (1759), in the edition of D.D. Raphael and A.L. Macfie, Clarendon Press, Oxford (1976), [hereinafter *Moral Sentiments*], at VI.ii.2.3.

<sup>24</sup> See P.H. Lindert and C.P. Kindleberger, *International Economics* (1982), pp. 401/402.

<sup>25</sup> See G. von Haberler, *The Theory of International Trade with its Applications to Commercial Policy* (1936), p. 26.

<sup>26</sup> See J.N. Bhagwati, *Protectionism* (1988), p. 24.

### C. Adam Smith's Liberalism

#### 1. Individual Freedom

Adam Smith considered that the desire of man to better his own material conditions is a desire that "though generally calm and dispassionate, comes with us from the womb, and never leaves us till we go into the grave. In the whole interval which separates those two moments, there is scarce perhaps a single instance in which any man is so perfectly and completely satisfied with his situation, as to be without any wish of alteration or improvement, of any kind".<sup>27</sup> In Smith's view, the "propensity to truck, barter, and exchange one thing for another"<sup>28</sup> thus had to be considered the most typical trait of mankind. It is an attribute that all human beings have in common and which separates them from the animals, for "nobody ever saw a dog make a fair and deliberate exchange of one bone for another with another dog. Nobody ever saw one animal by its gesture and natural cries signify to another, this is mine, that yours; I am willing to give this for that".<sup>29</sup> Hence, man trades in order to satisfy his natural desire to better his own material conditions.<sup>30</sup> He is, in other words, a *homo economicus*. His main aspiration is to become wealthy: "An augmentation of fortune is the means by which the greater part of men propose and wish to better their condition. It is the means the most vulgar and the most obvious".<sup>31</sup> Never satisfied with his present economic situation, he will always look for new opportunities to enlarge his capital. Given the fact that each individual knows best the economic potential of his own assets, the government should allow the individual the greatest possible freedom to trade in those assets. Interference by the government in this 'freedom of trade' in order to improve economic efficiency is both unnecessary and undesirable. Moreover, government intervention is no guarantee for success. The government only imagines that it knows better than the

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<sup>27</sup> See *The Wealth of Nations*, at II.iii.28. As Henry Spiegel put it, Adam Smith depicted man as Faustian, never satisfied with a given situation. Just like Goethe's Faust he will never cling to a given moment of happiness but will always be searching for new, even better times: "When on an idler's bed I stretch myself in quiet; There let, at once, my record end". See H.W. Spiegel, *Adam Smith's Heavenly City*, in: G.P. O'Driscoll Jr. (ed.), *Adam Smith and Modern Political Economy, Bicentennial Essays on the 'Wealth of Nations'* (1979), p. 105.

<sup>28</sup> See *The Wealth of Nations*, at I.ii.1.

<sup>29</sup> See *The Wealth of Nations*, at I.ii.2.

<sup>30</sup> See *The Wealth of Nations*, at IV.v.b.43.

<sup>31</sup> See *The Wealth of Nations*, at II.iii.28.

individual how to act:

What is the species of domestick industry which his capital can employ, and of which the produce is likely to be of the greatest value, every individual, it is evident, can, in his local situation, judge much better than any statesman or lawgiver can do for him. The statesman, who should attempt to direct private people in what manner they ought to employ their capitals, would not only load himself with a most unnecessary attention, but assume an authority which could safely be trusted, not only to no single person, but to no council or senate whatever, and which would nowhere be so dangerous as in the hands of a man who had folly and presumption enough to fancy himself fit to exercise it.<sup>32</sup>

The individual can make optimal use of the opportunities he sees present in the economy only if government allows him the freedom to seize those opportunities. Economic welfare and economic growth will not arise from the think-tank of a carefully planning government, but rather from the widespread knowledge and experience present amongst the people. The ardent attempts of government officials to devise complex schemes and objectives for the economy are unwarranted and even harmful. A government should preserve individual economic freedom and not restrict it through all sorts of inhibiting rules and regulations:

Every man, as long as he does not violate the laws of justice, is left perfectly free to pursue his own interest his own way, and to bring both his industry and capital into competition with those of any other man, or order of men. The sovereign is completely discharged from a duty, in the attempting to perform of which he must always be exposed to innumerable delusions, and for the proper performance of which no human wisdom or knowledge could ever be sufficient; the duty of superintending the industry of private people, and of directing it towards the employments most suitable to the interests of society.<sup>33</sup>

Infringement of this natural freedom of the individual was, in Smith's view, allowed only in case of manifest 'spillover damages' for other citizens. That is to say, encroachment upon the natural freedom of mankind was justified only when it concerned 'technological externalities', not when the 'damage' was merely financial.<sup>34</sup> He disapproved, for example, of government restrictions on the entrance to the retail trade, although the shopkeepers "may so as to hurt one another".<sup>35</sup> According to Smith, it was the government's task to protect the freedom of trade through rules of law. For that purpose, the government has "the duty of establishing

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<sup>32</sup> See *The Wealth of Nations*, at IV.ii.10.

<sup>33</sup> See *The Wealth of Nations*, at IV.ix.51.

<sup>34</sup> See J.M. Buchanan, The Justice of Natural Liberty, in: G.P. O'Driscoll (ed.), *Adam Smith and Modern Political Economy: Bicentennial Essays on the 'Wealth of Nations'* (1979), p. 123: "Adam Smith distinguished between what we would now call pecuniary and technological externalities. His approved interferences with natural liberty extended only to cases where genuine technological externality could be demonstrated, and he quite explicitly stated that possible pecuniary spillovers gave no cause for restrictions on trade".

<sup>35</sup> See *The Wealth of Nations*, at II.v.7.

an exact administration of justice".<sup>36</sup> He feared, however, that the producer lobbies directed at limiting competition were so strong that his system of 'natural freedom protected by law' would always remain an illusion. A society "where things were left to follow their natural course, where there was perfect liberty"<sup>37</sup> seemed to be an unattainable ideal. Somewhat embittered, he therefore commented:

To expect, indeed, that the freedom of trade should ever be entirely restored in Great Britain, is as absurd as to expect that an Oceana or Utopia should ever be established in it. Not only the prejudices of the publick, but what is much more unconquerable, the private interests of many individuals, irresistibly oppose it. Were the officers of the army to oppose with the same zeal and unanimity any reduction in the number of forces, with which master manufacturers set themselves against every law that is likely to increase the number of their rivals in the home market; were the former to animate their soldiers, in the same manner as the latter enflame their workmen, to attack with violence and outrage the proposers of any such regulation; to attempt to reduce the army would be as dangerous as it has now become to attempt to diminish in any respect the monopoly which our manufacturers have obtained against us.<sup>38</sup>

## 2. The Invisible Hand

Adam Smith proceeded from the assumption that the individual always thinks about opportunities to better his own material circumstances. He is not concerned with the material conditions of his fellow-man or with the economic welfare of his country, partly because he is too busy with himself and others do not really interest him, and partly because his knowledge is simply insufficient to understand the workings of the economy in its entirety. He can judge his own economic situation very well, but he cannot assess the economic situation of his country.<sup>39</sup> Nonetheless, when the individual thus afflicted with a limited insight pursues certain limited objectives, namely, only those objectives he considers beneficial to himself, this pursuit will lead to positive economic results for the entire nation, results that never were envisaged by the individual in question. In *The Theory of Moral Sentiments*, Smith clarified a similar observation with the help of a metaphor: "The wheels of the watch are all admirably adjusted to the end for which it was made, the pointing of the hour. All their various motions conspire in the nicest manner to produce this effect. If they

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<sup>36</sup> See *The Wealth of Nations*, at V.i.b.1.

<sup>37</sup> See *The Wealth of Nations*, at I.x.a.1.

<sup>38</sup> See *The Wealth of Nations*, at IV.ii.43.

<sup>39</sup> See L. Schneider, 'Adam Smith on Human Nature and Social Circumstance', in: G.P. O'Driscoll (ed.), *Adam Smith and Modern Political Economy: Bicentennial Essays on the 'Wealth of Nations'* (1979), p. 46.

were endowed with a desire and intention to produce it, they could not do it better. Yet we never ascribe any such desire or intention to them".<sup>40</sup> Just as the wheels of a watch are capable of pointing the hour, which may be considered the ultimate objective of these wheels, mankind is capable of achieving objectives which transcend the personal goals of each separate individual.<sup>41</sup> The insight of mankind is limited and does not extend to a comprehension of the much broader economic and social consequences of his acts.<sup>42</sup> Motivated only to better his own economic situation, he betters the economic situation of the entire nation. This result also is what Smith intended to express with the famous 'invisible hand' passage of *The Wealth of Nations*:

he intends only his own gain, and he is in this, as in many other cases, led by an invisible hand to promote an end which was no part of his intention. Nor is it always the worse for the society that it was no part of it. By pursuing his own interest he frequently promotes that of the society more effectually than when he really intends to promote it. I have never known much good done by those who affected to trade for the publick good.<sup>43</sup>

Thus, by simply pursuing his own interest the individual promotes the public interest. Smith insisted that the individual should not even try to promote the public interest. *Homo economicus* simply should stick to following his own limited interests. Unconscious of the fact that these acts automatically will find their place as links of a chain extending to points never to be foreseen within the limited conception of mankind,<sup>44</sup> he promotes the public interest: "Every individual is continually exerting himself to find out the most advantageous employment for whatever capital he can command. It is his own advantage, indeed, and not that of the society, which he has in view. But the study of his own advantage naturally, or rather necessarily leads him to prefer that employment which is most advantageous to the society".<sup>45</sup>

The individual, Smith stated time and again, is only trying to improve his own material conditions. The 'invisible hand', however, mediates between the individual's self-interest and the public interest. The metaphor refers to some sort of 'conversion-mechanism' that

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<sup>40</sup> See *The Theory of Moral Sentiments*, at II.ii.3.5.

<sup>41</sup> See Schneider, *supra* note 39, at 47.

<sup>42</sup> See Schneider, *supra* note 39, at 48.

<sup>43</sup> See *The Wealth of Nations*, at IV.ii.9.

<sup>44</sup> See Schneider, *supra* note 39, at 51.

<sup>45</sup> See *The Wealth of Nations*, at IV.ii.4.

transforms private interests into public interest,<sup>46</sup> a mechanism that could not function under the mercantilist regime. As Cropsey has explained "the invisible hand is a metaphor that certainly presupposes that men are compelled to respond in act to their natural selfishness and rapacity. It presupposes that men may be described as being in bondage to the compulsions of nature. But in contradiction to what it presupposes, what it says is that something called nature transforms the ugliness and bondage of man into a true human good".<sup>47</sup> Indeed, we do owe much to our own egotism, especially to the egotism of those among us who engage in trade. Thanks to those entrepreneurs, we all are able to choose as consumers from a broad selection of products. We do not, however, owe them a humble speech of thanks. We have at our disposal a broad assortment of goods, not because businessmen are so fond of us, but only because they stand to gain from our purchases. As Smith put it: "It is not from the benevolence of the butcher, the brewer, or the baker that we expect our dinner, but from their regard to their own interest. We address ourselves, not to their humanity but to their self-love, and never talk to them of our necessities but of their advantages. Nobody but a beggar chuses to depend chiefly upon the benevolence of his fellow-citizens".<sup>48</sup>

Smith's 'invisible hand' does not have anything to do with magic or divine guidance, but stands in direct connection with the harsh rule of competition.<sup>49</sup> In Smith's opinion, the virtue of competitive conditions is mainly its educative aspect in behalf of greedy entrepreneurs. Perpetually, the businessman should feel the pressure of competition. Constantly, he should be forced to remain innovative. Time and again, he should explore new opportunities. Because he is doomed to compete, he fulfills a particularly important role in society. He is condemned to supply high-quality goods against the lowest possible prices. The self-interest of the businessman is a fact, but fortunately it has an extremely important function: it takes care of the welfare of all members of society. But we do have to watch out for the merchant. If he sees his chance, he will try to make his profits the easy way. He will

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<sup>46</sup> See Schneider, *supra* note 39, at 53.

<sup>47</sup> See J. Cropsey, 'The Invisible Hand: Moral and Political Considerations', in: G.P. O'Driscoll Jr. (ed.), *Adam Smith and Modern Political Economy, Bicentennial Essays on the Wealth of Nations* (1979), p. 171.

<sup>48</sup> See *The Wealth of Nations*, at Lii.2.

<sup>49</sup> See N. Rosenberg, 'Adam Smith and Laissez-faire Revisited', in: G.P. O'Driscoll Jr. (ed.), *Adam Smith and Modern Political Economy, Bicentennial Essays on the Wealth of Nations* (1979), p. 24.

take every opportunity to escape the invisible hand by monopolizing his trade: "People of the same trade seldom meet together, even for merriment and diversion, but the conversation ends in a conspiracy against the public, or in some contrivance to raise prices".<sup>50</sup> The main reason why Smith condemned mercantilism was that under the mercantilist regime government allowed the businessman to dodge the invisible hand. Government permitted him to enrich only himself and not his country. By being vulnerable to lobby pressures from business interests, government encouraged this negative attitude of mere self-enrichment and allowed the public interest not to be served. In the words of Nathan Rosenberg:

The violence of Smith's polemic against mercantilism lay in the fact that it enabled merchants to better their condition in a manner that did not contribute to the nation's economic welfare. As a result of the dispensation of monopoly grants, of the arbitrary bestowal of 'extraordinary privileges' and 'extraordinary restraints' upon different sectors of industry by the government, the individual merchant was provided with innumerable opportunities to enrich himself without enriching the nation.<sup>51</sup>

In Smith's view the government, in the interest of its people, rather should provide the proper legal framework within which the invisible hand could function unimpededly.

Adam Smith's harsh judgment on the nature of man often has been misinterpreted. In the literature, the egalitarian element in Smith's work has been largely neglected. The Scotsman, however, was very much concerned with the fate of the less favoured in society. It should be remembered that the economic and social circumstances of the 'common' man in Smith's Great Britain were particularly troublesome. In those days, the country was run by an aristocracy that did not care much about the working class. The people were viewed as a grey mass of workers, merely suited to keep the production process going. Their social circumstances were grim and wages were kept low, not only out of mercantilist considerations of how to better compete with foreign countries, but also because the government feared that better payment would lead to indolence. Adam Smith did not agree with this narrow point of view: "Some workmen, indeed, when they can earn in four days what will maintain them through the week, will be idle the other three. This, however, is by no means the case with the greater part".<sup>52</sup> He was not very fond of the rich elite: "With the greater part of rich people, the chief enjoyment of riches consists in the parade of riches, which in their eyes is never so compleat as when they appear to possess those decisive marks

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<sup>50</sup> See *The Wealth of Nations*, at I.x.c.27.

<sup>51</sup> See Rosenberg, *supra* note 49, at 23.

<sup>52</sup> See *The Wealth of Nations*, at I.viii.44.

of opulence which nobody can possess but themselves".<sup>53</sup> In Smith's view, the wealth of a nation consisted in the wealth of *all* its citizens, for "no society can surely be flourishing and happy, of which the far greater part of the members are poor and miserable".<sup>54</sup> He saw a direct connection between the total accumulated income of a country and the welfare of the country's poor. His objective was to show that through the elimination of limitations on the free functioning of the market, and via the unhindered operation of the system of natural freedom, national income would grow and the standard of living would rise. He wanted to demonstrate how economic growth ultimately would improve the situation of the poor.<sup>55</sup>

### 3. The Division of Labour

Adam Smith also has explained how a division of labour makes the production process more efficient. *The Wealth of Nations* begins with the words: "The greatest improvement in the productive powers of labour, and the greater part of the skill, dexterity, and judgment with which it is any where directed, or applied, seem to have been the effects of the division of labour".<sup>56</sup> The notion 'division of labour' implies that every task in the production process is divided amongst different persons. The constant repetition of a certain task makes this task more easy and improves its execution. When, on the other hand, one person performs different tasks each task is repeated less often and there is less practice leading to optimal performance. A simple example will suffice to explain what Smith meant. A physician provides his patients with information on diseases. In theory, it also would be possible for someone to obtain the necessary medical knowledge for himself if he is prepared to spend five years or more on self-study. However, everybody cannot afford to spend five years of intensive study with the sole purpose of informing themselves on their own illnesses. It thus makes sense for certain people in society to specialize in medical science if such training of an individual enables that person to inform thousands of other persons. Furthermore, the sole practice of the medical profession by a few trained physicians will give these physicians an

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<sup>53</sup> See *The Wealth of Nations*, at I.xi.c.31.

<sup>54</sup> See *The Wealth of Nations*, at I.viii.36.

<sup>55</sup> See also Buchanan, *supra* note 34, at 122.

<sup>56</sup> See *The Wealth of Nations*, at I.i.1.



experience which better enables them to perform their task.<sup>57</sup>

Smith further explained how the division of labour is limited by the extent of the market. If more goods and services are sold, the division of labour in society can be more extensive. The more the division of labour can expand, the more the market will expand. A larger market justifies specialization and specialization results in efficiency. A house-painter in a small village will have to be capable of performing all kinds of paint jobs, and perhaps he even will have to be able to paper a room, in order to keep his head above water. His colleague in the city probably can devote himself to walls or wood, since his range of customers is much larger. It is likely that after some time the city painter will be better in his own particular area, than the village painter will be in the same area. Since he also will work faster due to his gained experience, he probably will charge his customers less. In other words, the greater number of customers in a city generates a greater demand and thus more painters are needed to meet the demand, resulting in an expansion of services, and this expansion is what enables various painters to customize their services to meet the highly specialized needs of a given subset of the clientèle. Smith was a fervent advocate of the global free flow of goods, that is, of creating the most extensive market conceivable. Smith considered that under a regime of free trade all goods would be produced where the absolute real costs of production would be the lowest. Thus, goods which can be produced domestically at real costs lower than the real production costs of goods produced abroad should be exported. Goods which can be produced abroad at real costs lower than the real production costs of goods produced domestically should be imported. No single country can produce everything, so let each make what it can make best. Essentially, the world market is not any different from the home market:

it is the maxim of every prudent master of a family, never to attempt to make at home what it will cost him more to make than to buy. The taylor does not attempt to make his own shoes, but buys them of the shoemaker. The shoemaker does not attempt to make his own cloaths, but employs a taylor. The farmer attempts to make neither the one nor the other, but employs those different artificers. All of them find it for their interest to employ their whole industry in a way in which they have some advantage over their neighbours, and to purchase with a part of its produce, or what is the same thing, with the price of a part of it, whatever else they have occasion for.<sup>58</sup>

What is prudence in the conduct of every private family, can scarce be folly in that of a great kingdom. If a foreign country can supply us with a commodity cheaper than we ourselves can

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<sup>57</sup> The example is taken from K.J. Arrow, 'The Division of Labor in the Economy, the Polity, and Society', in: G.P. O'Driscoll Jr. (ed.), *Adam Smith and Modern Political Economy, Bicentennial Essays on the 'Wealth of Nations'* (1979), p. 154.

<sup>58</sup> See *The Wealth of Nations*, at IV.ii.11.

make it, better buy it of them with some part of the produce of our own industry, employed in a way in which we have some advantage.<sup>59</sup>

But what happens if other countries are able to produce all goods we are interested in cheaper than we can? In other words, what happens if we do not have any absolute cost advantages? If we are forced to import virtually everything, and if we can export hardly anything, will this not cause a major trade deficit that will be devastating to the country? Adam Smith never directly answered this question, but some forty years after publication of *The Wealth of Nations* it was David Ricardo who showed that even in such a case a country still could benefit from trade. Ricardo extended Smith's theory of absolute cost advantage with the theory of comparative cost advantage. Ricardo's theory was based on a model with two countries (England and Portugal), two products (cloth and wine), and one production factor (labour). Ricardo proved that even when Portugal would have an absolute cost advantage with regard to England in both products, it still would be beneficial for both countries to trade, if each country would concentrate on producing the good it could *relatively* produce the cheapest and then would exchange that good for the other.<sup>60</sup>

Of course, it is difficult to apply the simple Ricardian model to the factual circumstances of contemporary world trade. However, over the years economists have further developed the model and the general conclusion of this analysis is that it is essentially correct and that it still applies.<sup>61</sup> As was explained in the 1990 *World Trade Survey of The Economist*: "Many refinements and extensions of this simplest possible trade model (two countries, two goods, one factor of production) are needed to paint a lifelike picture of the world. This picture has to include the fact that most countries are generalists, not narrow specialists. They produce, export and import a wide range of goods. The Ricardian theory was duly refined and extended. In its modern, sophisticated form it retains what is essential (...): (a) if trade is unimpeded, it will be driven by comparative advantage; (b) free trade makes countries better off".<sup>62</sup> International trade promotes better production against lower costs by opening up a more extensive market which makes specialization possible through which economic welfare

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<sup>59</sup> See *The Wealth of Nations*, at IV.ii.12.

<sup>60</sup> See D. Ricardo, *Principles of Political Economy and Taxation* (1817); in the edition of P. Sraffa, *Works and Correspondence of David Ricardo*, Cambridge University Press, Cambridge (1951), p. 133-149.

<sup>61</sup> See Lindert and Kindleberger, *supra* note 24, at 34.

<sup>62</sup> See *The Economist*, 'World Trade Survey' (22 September 1990), p. 16.

increases: "trade is not a 'zero-sum game', in which one side gains only what the other loses. The whole world gains from trade".<sup>63</sup>

#### *D. The Case for Free Trade*

##### 1. Tariffs and Quotas

The most well-known barriers governments impose against the import of foreign products are tariffs. Tariffs are like taxes levied on foreign products upon importation. They make these products more expensive for consumers. The levy of a duty disturbs the price which otherwise would have resulted from the natural interplay between supply and demand. Through its intervention, the government prevents the consumer from choosing the product which best suits his interest and budget. The government forces the consumer to choose the domestic product. Moreover, the economy in its entirety suffers. Economic analysis has shown that "consumers lose more than the combined gain of producers and the government".<sup>64</sup> Traditional economic theory accepts only two arguments favouring tariffs: the infant-industry argument and the optimal-tariff argument. The infant-industry argument suggests that in a given situation of free trade it could be unprofitable to start out a new industry, but when the government would be prepared to allow the industry to develop behind a tariff wall, the industry eventually would be able to stand on its own legs.<sup>65</sup> However, judged on its merits the argument is not convincing. Is it not always the case that when an entrepreneur starts a new business, he has to reckon with initial losses? This state of affairs should not be a problem as long as the new industry is profitable in the longer term. Anyhow, it is generally held that only in a situation of clear imperfections on the capital market may a tariff be imposed. When the new entrepreneur would have to pay a relatively high interest on his investment, a tariff might be helpful.<sup>66</sup> It seems that such imperfections really exist only in developing countries and that even there a protective measure like a tariff might not be the best solution.<sup>67</sup>

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<sup>63</sup> See Lindert and Kindleberger, *supra* note 24, at 34.

<sup>64</sup> See *The Economist*, 'World Trade Survey', *supra* note 62, at 16.

<sup>65</sup> See J.R. Markusen and J.R. Melvin, *The Theory of International Trade* (1988), p. 220.

<sup>66</sup> See Markusen and Melvin, *supra* note 65, at 221/222.

<sup>67</sup> See Markusen and Melvin, *supra* note 65, at 222.

The optimal-tariff argument runs as follows. Theoretically, it is conceivable that a country has a monopolistic power with respect to a particular product and is able to influence the world market price. If it concerns an export product, the world market price will fall when the country increases its exports. If it is an import product, the world market price will rise when the country increases its imports. In both cases, it is argued, this country could make use of this situation by setting a tariff at a certain optimal level.<sup>68</sup> By doing so, it could improve its own welfare at the expense of other countries. However, the argument does not take into account the fact that other countries might retaliate. If this happens, the country that imposed the optimal tariff probably will be worse off than before.<sup>69</sup> In respect of both the infant-industry argument and the optimal-tariff argument, the *World Trade Survey of The Economist* pointed out that: "these cases have long been recognised and analysed in the literature. Yet the case for free trade remained almost universally accepted by economists - no other proposition could command such support from that argumentative profession. The qualifications to the case for free trade were regarded as interesting but unimportant. The economic risks of trying to act on the exceptions were seen as out of all proportion to the likely costs".<sup>70</sup>

Apart from protection by means of tariffs, a country can shield its economy from foreign competition by imposing a quota.<sup>71</sup> Quotas are limits on the amount of imports of a certain product. In contrast to tariffs, which directly affect the price of the imported product and only indirectly affect the quantity through the effect of the rise in price on the consumers' inclination to buy, quotas directly affect the quantity and only indirectly affect the price (since there is less of the product available the price will rise). In the final analysis, both tariffs and quotas limit quantity and lead to a rise in prices.<sup>72</sup> As the *World Trade Survey* notes: "The only difference is that instead of collecting that handy block of tariff revenues, a government imposing a quota lets this money be gathered by the wicked foreigners to whom the quota

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<sup>68</sup> See Markusen and Melvin, *supra* note 65, at 226-230.

<sup>69</sup> See Markusen and Melvin, *supra* note 65, at 230.

<sup>70</sup> See *The Economist*, 'World Trade Survey', *supra* note 62, at 16.

<sup>71</sup> A quota can also be combined with a tariff in a tariff quota, as happened in Council Regulation 404/93.

<sup>72</sup> See Markusen and Melvin, *supra* note 65, at 235.

applies".<sup>73</sup> One can distinguish between a non-discriminatory or 'global' quota and a discriminatory quota. The difference concerns the way in which the quota is administered. In case of a global quota, importers who have received an import license still are allowed to buy from the cheapest available foreign exporter and foreign exporters still can compete for the amount to be distributed. A discriminatory quota is a quota distributed through negotiations. Suppose the importation of 30,000 cars per month is allocated to Country I, Country II and Country III. Under a global quota, only the countries who supply the cars under the best conditions (for example, Countries I and II) would be able to sell. Under a discriminatory quota, however, Country III also has a right to fill its share of the quota, although it cannot compete with I and II. In other words, although I and II could supply us with 30,000 cars under the best conditions, they may supply us with, let's say, only 20,000 cars. Consumers are forced to accept 10,000 cars which are more expensive. Moreover, the producers in the exporting countries probably will make the arrangement that they will supply the cars only against the highest possible prices.<sup>74</sup>

## 2. The Invalid Unemployment Argument

Is it not strange that there is so little public resistance against protectionism? When government raises income tax or excise duties on petrol, great turmoil ensues in society. Hardly anyone, however, protests against the imposition of trade barriers, although these measures likewise cost the consumer money. Apart from the fact that citizens usually are not aware of the harmful effects of protectionism, it seems that for many citizens protectionism is somehow logical. In particular, the unemployment argument often is used to justify protectionist measures and usually is accepted without any serious reflection. The public at large sees the loss of jobs in domestic industries that are competing with foreign industries and blindly agrees with the government that the economy should be 'protected' against these greedy foreigners. W. Max Corden has explained why this nationalist line of thinking is erroneous. He has pointed out that the public usually sees the loss of jobs only in a particular sector of industry, a loss that indeed may be caused by import competition. However, pure analysis necessitates assessment of the economy in its entirety. In other words, the concept

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<sup>73</sup> See *The Economist*, 'World Trade Survey', *supra* note 62, at 16.

<sup>74</sup> The example is broadly based on J. Tumlin, *Protectionism, Trade Policy in Democratic Societies* (1985), p. 7/8.

of 'general equilibrium' has to be considered.<sup>75</sup> The protectionist measures are purported to prevent lay-offs in the affected domestic industries, yet other domestic industries often have to lay off workers because of the import restrictions. One such industry is the export industry. The economists Clements and Sjaastad have demonstrated convincingly that jobs saved in the domestic industry sector that is competing with foreign industry are saved only at the cost of jobs in the domestic export industry.<sup>76</sup> They showed that any restriction of imports equals a tax on imports and that a significant part of that tax (according to their calculations, about two-thirds) is transferred to the export industry. This is so for the following reasons. When domestic industries are shielded from foreign competition, the general wage level rises. Firms that produce import substitutes typically are able to shift the higher costs to the consumer. In the export industry, however, firms have to conform to the world market price. When their cost level rises, their profits fall immediately. The export industry will have to lay off workers. Thus, saving jobs in an import-competing industry through protection is negatively compensated by the loss of jobs in the export industry. Under a regime of free trade, the general wage level would be lower but the general price level would be lower as well. Purchasing-power would not necessarily suffer and more jobs would be created, thereby saving money otherwise spent under unemployment benefit schemes.

Many additional examples could be provided to show that the unemployment argument is in essence erroneous since it neglects general equilibrium considerations. Suppose South Korea expands the export of shoes to the European Community. If the Community allows this to happen, the South Korean balance of payments will improve (*ceteris paribus*). Since South Korea earns more, it probably will spend more. It also will import more goods from the European Community. The EC export industry will need more people in order to meet increased demand. Thus, if Country A exports more, it probably will import more. Likewise, if Country B imports more, it probably will export more. Hence, trade liberalization is not likely to entail a net loss of jobs.<sup>77</sup> As a GATT study confirmed: "there is no reason to expect liberalization to have an important effect on the level of aggregate unemployment since the

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<sup>75</sup> See W.M. Corden, 'Why Trade is not Free: Is there a Clash between Theory and Practice?', in: H. Giersch (ed.), *Free Trade in the World Economy: Towards an Opening of Markets* (1986), p. 2.

<sup>76</sup> See K.N. Clements and L.A. Sjaastad, *How Protectionism Taxes Exports* (1985).

<sup>77</sup> The example is based on W.M. Corden, 'Tell us Where the New Jobs will Come from', *The World Economy*, p. 186.

expanding export sector will be withdrawing people from the ranks of the unemployed at the same time as some workers from import-competing industries are joining those ranks".<sup>78</sup> Especially for countries where the export industry is relatively important, protectionism will usually mean a higher level of aggregate unemployment.

Protectionism also indirectly endangers the level of employment. Many Community industries utilize imported products in their production process. They use these imported products for the simple reason that they are cheaper. These industries are thus able to produce more cheaply and be more competitive. If they are forced to purchase more expensive domestic raw materials or half-products, they will be less competitive and they probably will have to lay off workers. A prime example is the steel industry.<sup>79</sup> For many years, producers in the Community have been forced (through import barriers or high anti-dumping duties) to buy Community steel against prices far above the world market price. Their products (for example, cars) have been more expensive than would have been necessary. If they had not been forced by the Community to buy expensive steel, car producers would have been able to sell more cars. They would have needed more workers. But instead of laying the blame for this situation on the Community institutions whose actions created this state of affairs, the blame is put on the Japanese who flood the European markets with cheap cars. These Japanese are able to produce so cheaply that they simply must be cheating. In the name of fair trade, barriers are raised against imports from Japan.

Foreign products often are cheaper than domestic products because they are made with cheap labour. An argument often heard is that competition between products made with cheap labour and products made with 'expensive' labour is, likewise, 'unfair' and unfair trade practices justify protection. Perhaps instead of complaining that foreign labour is so cheap, we need to ask ourselves why our labour is so expensive. Again there is a simple explanation, namely, the general wage level which is kept unjustifiably high. In most western

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<sup>78</sup> See R. Blackhurst, N. Marian and J. Tumlin, *Trade Liberalization, Protectionism and Interdependence*, (1977), p. 31. Clearly, things may not always be that simple in practice. The newly created jobs will not necessarily be in the same geographic region, and there may be income loss for workers who have lost a job wherein they may have worked for years and who now must begin again in a new job wherein they probably have little experience.

<sup>79</sup> For an American study, estimating that the 1984 U.S. voluntary restraint agreement on steel imports saved 16,900 jobs in the steel industry but cost 52,400 jobs in industries that use steel (for a loss/gain ratio of 3.1 to 1), see A. Denzau, *How Import Restraints Reduce Employment*, Center for the Study of American Business (1987).

economies, wages are kept high even if the industry does not have a comparative advantage.<sup>80</sup> For example, the European textiles and clothing industries cannot compete with the corresponding industries in developing countries due to the availability of cheaper labour in those countries. Yet despite this lack of a comparative advantage, these European industries still pay relatively high wages. To solve this problem, the Community has protected these industries from foreign imports of textiles by creating barriers against such imports. Yet these import restrictions, imposed solely to offset the perceived unfairness of the use of cheap labour to manufacture the imported goods, ultimately hamper the establishment of flourishing industries and a consequent elevation in the general wage level in the very countries where cheap labour is utilized. Thus these restrictions actually perpetuate the very problem they seek to address. Meanwhile, a vast amount of ECUs is spent each year on development aid while the underlying structural problem is neglected. Is it not almost embarrassing to deny the poor countries that one comparative advantage, cheap labour, and hinder them in building up an export industry, while maintaining an economically inefficient situation at home?<sup>81</sup>

Moreover, the lower wage level of the developing countries is not, in itself, a factor that should be criticized by the developed world. Wages may be lower because the cost of living is lower. Usually, however, the 'cheap labour' argument is buttressed by a related argument. In developing countries labour can be cheap because these countries do not have a proper system of worker protection. Although this probably is the case in many developing countries, developed countries never should be allowed to unilaterally force developing countries to adapt their legislation to, for example, a European-style system of social protection, by restrictive trade measures. Only within the framework of specific international negotiations should this problem be addressed. Labour in developing countries also is cheap because there is relatively more unskilled labour. Does this mean that we may impose import restrictions because it is unfair to keep your workers unskilled, or does it mean we have to reflect on ways to improve the educational system of developing countries with the help of — such international organizations as, for example, the ILO?

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<sup>80</sup> See Markusen and Melvin, *supra* note 65, at 216.

<sup>81</sup> Firm commitments to liberalize now have been laid down in the Agreement on Textiles and Clothing. Only the future can tell, how serious these obligations will be taken.



Even more simple arguments could be given to explain why the unemployment argument is wrong. When, because of free trade, consumers would be able to substitute cheap foreign products for expensive domestic products, these consumers would save money. Probably, a majority would choose to spend at least part of that money. It may be safely assumed that with their extra money they also will buy domestic products. They thus would create employment. As Corden rightly notes: "If the average citizen were given an extra \$500 per annum, what would he or she spend it on? This spending would, of course, lead to extra demand for domestically-produced manufactures and services and thus generate employment".<sup>82</sup> The bottom line is that the problem of unemployment simply cannot be solved by raising import barriers against foreign competition. The Leutwiler Report explains that this problem calls for a different strategy:

The way to maximize job opportunities is to help workers take advantage of change. In the short run, that means retraining; in the long run, and even more important, it means a commitment to make high quality education available to all. The workers of tomorrow's advanced industries will have to be perpetual students, technologically adept and intellectually flexible, if they are to take full advantage of the changes which will drive economic growth.<sup>83</sup>

Apart from the fact that protectionism may be viewed by the public at large as 'logical', many citizens also feel that when their industries suffer from stiff foreign competition the government should act, because some day they themselves might be the workers who lose their jobs. Corden has pointed to this 'ideological' factor which might induce a society to help the potential 'losers' of the economic process. Corden calls this the 'conservative welfare function' or (also) the 'social insurance principle' which refers to a sort of implicit agreement between the potential losers and the other members of society.<sup>84</sup> The losers are offered relief at the expense of the others who accept this burden because they realize that they themselves might need help one day. The relatively small losses which they suffer are considered the insurance premium to be paid.<sup>85</sup> Although the thought is laudable, it still cannot justify protectionism. There are many other less harmful ways to address the problems of the 'losers of free trade'. Furthermore, the government does not have the means to always help everybody.<sup>86</sup> The premium is no guarantee for payment in case of injury.

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<sup>82</sup> See Corden, *supra* note 77, at 187.

<sup>83</sup> See GATT, *Trade Policies For a Better Future: Proposals for Action* (1985), p. 28.

<sup>84</sup> See Corden, *supra* note 75, at 4.

<sup>85</sup> See Corden, *supra* note 75, at 10/11.

<sup>86</sup> See E.U. Petersmann, *Constitutional Functions and Constitutional Problems of International Economic Law* (1991), p. 119.

### 3. The Interests of the Consumer

Normally, a consumer<sup>87</sup> has a choice between purchasing a domestic or a foreign product. Domestic products usually compete with like imported products. When the imported product better suits the consumer's taste and budget than does the domestic product, he will purchase the imported product. As previously noted, tariffs and quotas raise, directly or indirectly, the price of the imported product. Consequently, competition between the domestic product and the imported product is restricted or even eliminated. The consumer is no longer allowed a fair choice between the domestic product and the imported product, but is pushed into buying the domestic product. His interests clearly are affected. Studies concerning the costs and benefits of protectionism substantiate that protectionism offers few advantages and entails high costs for consumers. It has been estimated that in 1983 the cost for Community consumers of protective measures taken by the Community institutions amounted to about 150 billion ECU.<sup>88</sup> In 1992, the transfer of income in the Community agricultural sector from consumers to producers was about 420 ECU per Community citizen.<sup>89</sup> The higher prices and higher taxes were necessary to cover the cost of relief measures, such as subsidies, for the agricultural sector. For sugar, for example, the extra annual cost to consumers for the benefit of sugar producers was, on average, 40 ECU per family of four persons between 1979 and 1989.<sup>90</sup> In the United Kingdom, the cost of protection in the clothing industry has been estimated at 120 ECU per year for a family of four.<sup>91</sup> For the people with low incomes, protectionism is even more burdensome. If protectionism would have any effect - if, for example, it would create employment - at least consumers would pay higher prices for a good cause. Protectionism, however, is not 'cost-effective'. The cost of saving a job by imposing protective measures is generally higher than the wage connected with the job.<sup>92</sup> Referring to these conclusions, based on GATT and OECD figures, Sir Leon Brittan noted that:

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<sup>87</sup> A consumer may be the final consumer or the manufacturer who uses the imported product as an input for his own product.

<sup>88</sup> See Petersmann, *supra* note 86, at 109.

<sup>89</sup> See GATT, *Trade, the Uruguay Round and the Consumer*, report of 11 August 1993, p. 5.

<sup>90</sup> See GATT report, *supra* note 89, at 6.

<sup>91</sup> See GATT report, *supra* note 89, at 7.

<sup>92</sup> See GATT report, *supra* note 89, at 9.

The right question to ask is whether such scarce resources could not be better used by alleviating the costs of adjustment to competition such as by retraining and improving the mobility of labour rather than by subsidizing jobs uneconomically.<sup>93</sup>

We need to refine the micro economic analysis of trade policy measures, ensure that all the costs to the consumer are fully accounted for and be more transparent in the information we make available to interested parties, including consumer organizations.<sup>94</sup>

Indeed, transparency of trade policy measures would make clear how consumers are adversely affected and would reduce protectionism to the benefit of a country's economic welfare.<sup>95</sup> The foreign trade policy of the European Community is of direct importance for the European consumer. However, "consumers are seldom informed about how the availability, quality, price and choice of the hundreds of items which they buy in the shops each year are affected by trade policy decisions. If they knew how much of their household budgets are determined by decisions to protect individual industries - and for how little effect - they might be shocked".<sup>96</sup> When consumers are viewed as a 'domestic industry' using the imported product, it is obvious that their interests should be taken into account.<sup>97</sup> Moreover, as trade restrictions affect the whole economy: "it does not appear inappropriate to allow the degree of protection of the domestic industry to vary in function of other considerations than the injury suffered by that industry, taking the attending consequence in stride that in some cases the injury to the domestic industry will be remedied in full and in other cases not. That a given trade measure would impose on the consumers a disproportionate burden is a consideration as respectable as other (...) considerations".<sup>98</sup>

It is indeed "high time that governments made clear to consumers just how much they pay - in the shops and as taxpayers - for decisions to protect domestic industries from import

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<sup>93</sup> See L. Brittan, 'Acceptance Speech - Consumers for World Trade Award for Distinguished Service in the Cause of Open and Competitive World Trade', Washington D.C., 14 September 1993, p. 4.

<sup>94</sup> See Brittan, *supra* note 93, at 5.

<sup>95</sup> See the various recommendations of the OECD; e.g., 'Resolution of the Council concerning the Report on International Trade and the Consumer - Action taken to give effect to the OECD Checklist and to the Recommendation of the Committee for Consumer Policy, in: OECD, *Acts of the Organization*, Vol. 27, (1987).

<sup>96</sup> See GATT report, *supra* note 89, at 4.

<sup>97</sup> See J.H.J. Bourgeois, 'Trade Measures, Competition Policy and the Consumer, in: P. Demaret, J.H.J. Bourgeois, I. Van Bael (eds.), *Trade Laws of the European Community and the United States in a Comparative Perspective* (1989), p. 253.

<sup>98</sup> *Ibid.*

competition".<sup>99</sup> However, better information on how consumers are being forced to pay higher prices without any clear positive effect will hardly contribute to the respect of Community citizens for the Community institutions. It is quite understandable that the Commission is not chomping with impatience to reveal to European consumers - for example, on the basis of a 'protection balance sheet' as proposed by the Leutwiler Report<sup>100</sup> - precisely what the costs and benefits of a specific protective measure are. The decision to protect, in violation of both international and Community law and without much chance of success, a Community industry by making foreign products far more expensive than necessary, is a decision which is rather difficult to explain. It is indeed much easier to mumble that the 'public interest' calls for protective measures. It is not entirely inconceivable that when the full economic consequences of Council Regulation 404/93 become apparent in Member States such as Germany, Belgium and The Netherlands, citizens might start to wonder whether their own government would have taken an equally harmful decision. Eventually, the significance of EU membership might become less obvious. Increasingly, citizens all over the world demand to be better informed because they want to double-check important decisions of the public authorities. Slowly, it will become more clear to Community citizens that the discretionary powers of the Community institutions in the area of foreign trade policy often are not utilized in a manner which conforms to their best interests. As Corbet has noted with vigour, this situation has to change soon:

bureaucrats in industrialized countries have been left by ministers to play God for too long in the field of international trade and competition; handing out a little bit of regulation here, doing a little bit of negotiation there, cartelising one industry after another, until they have helped not only to screw up the GATT system but also, and even more importantly, to screw up the economies in whose interests they might actually have believed they were working.<sup>101</sup>

#### 4. The New Trade Theory

In the middle of the 1980s, a new trade theory emerged which seemed to offer more convincing arguments in favour of import restrictions. The new theory suggested that by

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<sup>99</sup> See GATT report, *supra* note 89, at 1 and 4.

<sup>100</sup> See GATT, *Trade Policies for a Better Future* (1985), *supra* note 83.

<sup>101</sup> Letter to the Financial Times by Corbet of the Trade Policy Research Center, 29 January 1988. Quoted from: I. Van Bael, 'Lessons for the EEC: More Transparency, Less Discretion, and, at Last, a Debate?', in: J.H. Jackson and E.A. Vermulst (eds.), *Antidumping Law and Practice: A Comparative Study* (1990), pp. 407/408.

intervening 'strategically' in certain specific sectors of industry, a country could capture economic 'rents', thereby increasing its economic welfare at the expense of other countries. Meanwhile, the new approach has been strongly criticized and generally rejected as a practical policy option. The lack of correct information creates overwhelming problems for policy makers. Small mistakes in calculations may have disastrous consequences. The actual intervention appears to be extremely difficult. Bhagwati, for example, has pointed out that "sensitivity (or lack of robustness) of policy interventions to assumptions about the nature of oligopolistic strategic interaction creates information requirements for policy intervention that appear to many of the architects of this theoretical innovation to be sufficiently intimidating to suggest that policymakers had better leave it alone".<sup>102</sup> Moreover, just as in case of the 'optimal tariff', strategic trade policy analysis does not take into account that other countries might retaliate, something which is highly likely in the sensitive areas on which the advocates of strategic trade policy focus.<sup>103</sup> Furthermore, there will be very few industries in which there is room for only one producer. In most cases, the captured rents will have to be shared with three or four others.<sup>104</sup> In addition, there is the more general counter-argument that providing aid to a certain industry will cause envy and will lead to claims from competitors: "While the government is conscientiously trying to steer a course through all this, it is beset from all sides by every industry you care to name, pleading its case for special treatment. To conduct a successful policy against such odds would be a miracle".<sup>105</sup> In a study entitled *Empirical Research on Trade Liberalisation with Imperfect Competition* J. David Richardson of the University of Wisconsin therefore concluded that even in the highly unlikely case that governments are able to obtain all the necessary information, they utilize this information in the right manner, and there is no retaliation by other countries, free trade is still to be preferred to the 'managed trade' proposed by the strategic trade policy advocates.<sup>106</sup> Still, however, billions of ECUs are wasted each year in the European

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<sup>102</sup> See Bhagwati, *supra* note 26, at 106/107. See also P.A.G. van Bergeijk and D.L. Kabel, 'Strategic Trade Theories and Trade Policy', 27 J.W.T. 175 (1993). These authors conclude that the "theoretical foundations on which the strategic trade policy is based appear to be highly susceptible to minor changes in the basic assumptions concerning the number of market players or strategies involved, or the strategies of companies and governments in other countries". *Ibid*, at 185.

<sup>103</sup> See Bhagwati, *supra* note 26, at 108.

<sup>104</sup> See *The Economist*, 'World Trade Survey', *supra* note 62, at 20.

<sup>105</sup> See *The Economist*, 'World Trade Survey', *supra* note 62, at 20.

<sup>106</sup> See OECD Economic Studies No. 12. See also *The Economist*, 'World Trade Survey', *supra* note 62, at 22/23.

Community on subsidies for the so-called strategic industries in an attempt to copy Japan's economic success story on the basis of the widespread misunderstanding that this 'targeting' is what made Japan big. It has been proven, however, that Japan's targeting choices have not been all that fortunate and that its spectacular economic growth must have other causes. As Karl Zinsmeister of the American Enterprise Institute has pointed out: "It is striking to note that many of Japan's feeblest industries are those that have been subsidized by the government. Many of its strongest businesses - such as home electronics, cameras, robotics, precision equipment, pianos, bicycles, watches and calculators, machine tools, and ceramics - developed without help from MITI or other agencies. Japan achieved its economic miracle not because of government planning but in spite of it".<sup>107</sup> An Australian study recently showed that the economic growth of South Korea would have been 7% higher if the government had opted for a non-interventionist economic policy. Protection of industries affects the ability of these protected industries to compete. Industries will be more successful without government help.<sup>108</sup>

As a matter of fact, proponents of strategic trade policy never have claimed that this policy could have any kind of general application, that is, could apply in environments other than strategic environments, which are defined as "settings in which small numbers of large, self-consciously interdependent agents interact".<sup>109</sup> The new trade theory never was intended to provide to interest groups new arguments for their protectionist demands. Paul Krugman, one of the most notable advocates of strategic trade policy, has warned that "there is a risk that interest groups that have a stake in trade policy will simply find in new ideas an excuse to advocate policies that are not likely to benefit the nation as a whole".<sup>110</sup> Even the authors that do accept strategic trade policy in principle agree on a specific hierarchy of potential for policy to be economically effective.<sup>111</sup> Not surprisingly, this hierarchy is virtually identical to the hierarchy suggested by the theory of optimal intervention which, in turn, is in line with GATT law. Most promising, or least likely to fail, are market perfecting policies, policies

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<sup>107</sup> Quoted from: R. Dale, 'Governments Fail at Picking Winners', *International Herald Tribune*, Rome edition, 22 April 1994.

<sup>108</sup> *Ibid.*

<sup>109</sup> See Richardson, *supra* note 2, at 108.

<sup>110</sup> See P.R. Krugman (ed.), *Strategic Trade Policy and the New International Economics* (1986), p. 19.

<sup>111</sup> See Richardson, *supra* note 2, at 115 and 117.

that stimulate provision of public goods such as economic infrastructure (in particular, telecommunications). Second most promising are general factor-market policies such as, for example, inducements to education and R&D. Third are trade policies, but only when they are subscribed to with extreme caution and only if they are market conforming or outward oriented. Fourth are sectoral policies, though these are not generally recommended. It seems that most authors are skeptical that a government can obtain the right information to carry out these policies efficiently. Least favoured and least likely to succeed, "despite impressions that strategic perspectives encourage corporate champions who are wrapped in the flag", is 'targeting', a policy directed at promoting specific firms, as distinct from industries.<sup>112</sup> It appears that after perhaps "an early flirtation with quasi-mercantilist perspectives", economists again agree on the basic fact that trade liberalization is indeed the most "powerful generator of economic benefits".<sup>113</sup>

Corden has commented that, as an economist, he could think of only one reason to feel positive about the persistent survival of protectionist views. If the layman were to see economic issues as clearly as the economist, he himself would have to worry since that would throw doubt upon the need for the economic profession. The economist should feel relieved about the fact that the average citizen who never has browsed through an elementary economics handbook does not understand the concept of 'general equilibrium'.<sup>114</sup> It must be assumed, however, that Paul Krugman has browsed through several economics handbooks, not all of them elementary. Still Krugman has, unwillingly so he claims, encouraged the 'new protectionism' by presenting theoretical arguments in a way that suggests they could have some valuable general application in practice. At least on one occasion, he has deliberately presented his ideas in a popular fashion in order to 'convince' the layman, namely in the booklet he wrote with Rudiger Dornbusch for the Eastman Kodak Company.<sup>115</sup> In his *The World Trading System at Risk*, Jagdish Bhagwati shows no mercy for

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<sup>112</sup> See Richardson, *supra* note 2, at 117/118.

<sup>113</sup> See Richardson, *supra* note 2, at 108/109.

<sup>114</sup> See Corden, *supra* note 75, at 2.

<sup>115</sup> See R. Dornbusch, P.R. Krugman et al., *Meeting World Challenges: United States Manufacturing in the 1990s* (1989). When Krugman warns that his views and those of his compatriots have been misrepresented and that "there is a risk that interest groups that have a stake in trade policy will simply find in new ideas an excuse to advocate policies that are not likely to benefit the nation as a whole", it might be asked whether he himself has not willingly increased that risk.

the two prominent economists led astray. Referring to their arguments as "ignorant prattle", he states:

Unburdened by historical knowledge, scientific expertise, and the sustained scholarly reflection that these matters require and that the lay public automatically arrogates to them in view of either their distinction in fields other than international trade or their public visibility, these economists have entered trade policy with pronouncements that will not survive scrutiny but which nonetheless bring comfort to the political forces and the economic interests that see no virtue in the GATT and its tenets. Nothing is more important to special interests than to seek legitimacy by citing at least "one reputable academic" on their side so that the congruence of their private gain and the public good is established.<sup>116</sup>

Do professional economists not have professional responsibilities? Is it not their fault as well that mercantilists ideas still are very much alive amongst the lay public even though these ideas are recognized to be a doctrine clearly opposed to the citizen's economic interests?<sup>117</sup> Who actually benefits from complicated calculations which show that protectionism might also have some positive results, when the basis for those calculations is formed by assumptions and circumstances that will never arise in practice? According to Edwin Cannan, the most well-known editor of Adam Smith's *Wealth of Nations*, a reproach may be leveled indeed at the economic profession: "Most of the simplest things in economics have never been put in such a way as to carry conviction to the mind of the sort of person who is in the great majority of every public, and the blame is not altogether to be put on his feeble mind, but in large measure on the unnecessarily complicated expositions offered by the economists".<sup>118</sup> It is of the utmost importance that the citizen should become aware and convinced of the harmful consequences of protectionism and gain insight into how he is directly harmed by the trade policy decisions of his government. Only such conviction ultimately will rob policy makers of the possibility of advancing incorrect arguments to justify legislation enacted against their own better judgment and to the detriment of the entire nation.

The real reasons for neo-mercantilism do not differ all that much from the reasons which occasioned classical mercantilism. As under classical mercantilism, powerful lobbies of national producers form the direct cause for import-restrictive policies. The policy makers of those days, however, could refer to a generally accepted economic theory to justify their acts.

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<sup>116</sup> See J.N. Bhagwati, *The World Trading System at Risk* (1991), p. 6.

<sup>117</sup> See, e.g., L.O. Broch, 'The Consumer Interest in Trade Policy and Protectionism', in: OECD, *International Trade and the Consumer* 77 (1986), p. 77: "During this decade of re-emerging protectionism, the International Organisation of Consumers Unions, speaking for consumers around the world, has been clear and consistent in its view that free trade between nations best furthers the interest of consumers".

<sup>118</sup> See E. Cannan, 'The Need for Simpler Economics', 43 *Econ. J.* (1933), p. 368.



The policy makers of today do not have that possibility. Today's policy makers are forced to hide behind smoke screens. Adam Smith turns in his grave and mutters bitterly: "It cannot be very difficult to determine who have been the contrivers of this whole mercantile system; not the consumers, we may believe, whose interest has been entirely neglected; but the producers, whose interest has been so carefully attended to".<sup>119</sup> Governments cannot act as distinctively useful agents in national or international markets on behalf of their constituents. Only when the individual is left free to pursue his own economic interest, will the public interest be optimally served. A method needs to be found that will establish and safeguard a genuinely liberal trading regime, and it is already clear which method is unsuited. When a government is allowed too much discretion, it will be exposed to a pressure of such a force and intensity that it cannot be expected to resist that pressure. When discretionary powers are too broad and too uncontrolled, the temptation becomes too much. On the basis of deceptive arguments, such as protection of employment and promotion of fair trade, protection will be awarded to privileged national industries at the expense of other industries, the consumer, and the taxpayer. As Phedon Nicolaides notes: "The worst method is to give to politicians *carte blanche* in the form of 'fair trade', so that they can justify any protection they award to their favoured industries".<sup>120</sup>

### *E. Towards an Open and Competitive European Community*

Will an 'open Europe', as proposed by Sir Leon Brittan, not hurt the competitiveness of Community industry? Do Community producers not desperately need subsidies and temporary breaks from foreign competition by means of quotas in order to be able to compete with Japanese and American rivals for the favours of the consumer? What is the opinion of Community industry itself? In its report *Making Europe more competitive: Towards world-class performance*, the Union of Industrial and Employers' Confederations of Europe (UNICE) describes what it sees as the real causes for the decline in competitiveness of European industries competing in the world market. The level of government intervention and government activity in the Member States of the Community, the report points out, has increased so much during the last decades that their sheer size has an exceptionally negative

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<sup>119</sup> See *The Wealth of Nations*, at IV.viii.54.

<sup>120</sup> See Ph. Nicolaides, 'How Fair is Fair Trade?', J.W.T.L. 147 (1987), p. 162.

impact on economic efficiency. The State is involved in too many activities that could be performed more efficiently by the private sector.<sup>121</sup> Government spending as a percentage of GNP is consistently higher in the European Community than in Japan and the United States. The average over the period from 1983 to 1993 was 49% in the European Community as compared to 32% in Japan and 37% in the United States.<sup>122</sup> The difference is due to, *inter alia*, the much higher level of subsidy spendings in the Community: 1.9% of GNP as compared to 0.7% in Japan and only 0.2% in the United States.<sup>123</sup> UNICE concludes that the high tax level needed to finance all this government spending is detrimental to Community industry in general and, moreover, discourages new entrepreneurs. The general tax level in the European Community is much higher than in the United States or Japan. In 1990, the total tax revenue as a percentage of GNP was 41% in the European Community, as compared to 31% in Japan and 30% in the United States.<sup>124</sup> The relatively high tax level entails higher costs for undertakings and higher prices for consumers in the Community than for undertakings and consumers in the United States or Japan. This has caused an inflationary spiral since higher prices have resulted in higher wage demands.<sup>125</sup>

The UNICE report rightly considers that the public sector has only three basic tasks: "to create the right operating environment for markets to operate efficiently; to produce public goods and services that will not be produced in markets; and to redistribute incomes so that incomes are more fairly distributed than if the market were given free rein".<sup>126</sup> There is too much interference of the European Community with the private sector and the high cost which this interference entails is unacceptable, particularly since these costs are again shifted to Community industry. Public spending will have to be reduced. Only then will the tax burden of Community firms be reduced and will they be better able to compete. Priority measures include: (1) the reduction of unnecessary regulations and the number of tasks

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<sup>121</sup> See UNICE, *Making Europe more competitive: Towards world-class performance* (1993), p. 49.

<sup>122</sup> See UNICE report, *supra* note 121, at 50.

<sup>123</sup> *Ibid.* Subsidies may seem to prevent unemployment in the short term, but it is beyond doubt that they cost jobs in the longer term "by slowing down the process of re-structuring from declining to growth industries, and by imposing a higher tax burden on the rest of industry". *Ibid.*

<sup>124</sup> See UNICE report, *supra* note 121, at 51.

<sup>125</sup> See UNICE report, *supra* note 121, at 52.

<sup>126</sup> *Ibid.*

undertaken by the public sector; (2) the reduction and, finally, elimination of State aids; and (3) the transfer of available resources towards education, technology, and infrastructure expenditure. UNICE proposes a 'Reformed European Model' on the basis of the following crucial point: "The role of the State in the economy needs to be reduced (and the roles of individuals and firms need to be increased), by eliminating and/or transferring many of the activities currently undertaken by the State and by reducing the regulatory burden".<sup>127</sup>

UNICE's recommendations for Community trade policy are in line with this basic point. Protectionist measures have a negative impact on the competitiveness of Community firms. Competition from outside the Community is one of the major determinants of EC inter-firm rivalry<sup>128</sup> and this competition should be endured equally. Protectionism clearly is the wrong road to take:

Recourse to protectionist measures will give only small and temporary gains, because history and economic theory have demonstrated that protectionism is eventually counter-productive, reducing the standard of living of its 'protected' citizens below the level that it would otherwise have reached.

What is needed is an open trading system with a framework of clear and effective rules, which guarantee appropriate conditions of openness and competition. Not only will this increase the export market opportunities for EC firms, it will also help to improve the competitiveness of EC firms by increasing the level of inter-firm rivalry in the EC.<sup>129</sup>

UNICE's conclusions link up with the results of Michael Porter's extensive research into 'the competitive advantage of nations'. Porter has examined the way in which countries today attain competitive advantages in certain industries.<sup>130</sup> According to Porter, when trying to explain both national and firm prosperity, we must begin by asking ourselves the right question. The main economic objective of a nation is to provide a high and ever rising standard of living for its citizens and the ability to do so simply depends on the productivity with which a nation's resources are employed. The principal determinant in the long run of a nation's standard of living is productivity, defined as the value of the output produced by a unit of labour or capital. The amorphous notion 'competitive nations' is not very helpful to determine the 'wealth of nations'. The wealth of nations rather depends on both the quality and features of products that are produced by a nation's resources and the efficiency with

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<sup>127</sup> See UNICE report, *supra* note 121, at 54.

<sup>128</sup> See UNICE report, *supra* note 121, at 46.

<sup>129</sup> See UNICE report, *supra* note 121, at 47.

<sup>130</sup> See M.E. Porter, *The Competitive Advantage of Nations* (1990). During a period of four years, Porter examined the main industries of the ten most important trading nations.

which they are produced.<sup>131</sup> In order to conceptualize the interrelated elements which together comprise a nation's competitive advantage, Porter presents the Diamond model. This model was in fact used as the basis for the EC Commission's first detailed account of EC industrial policy, the report on *Industrial Policy in an Open and Competitive Environment*.<sup>132</sup> The Diamond is made up of four attributes which together create the domestic competitive environment for enterprises, and consequently, determine the ability to compete globally. These four attributes are factor conditions, demand conditions, existence of supporting industries, and firm strategy and rivalry. The basic mistake made by the Community authorities was that it failed to acknowledge Porter's crucial extra-Diamond variable, namely, government. According to Porter, governmental actors should stimulate but not try to control competitive advantage. Instead of following the guidelines presented by Porter to its full extent, the Community's *dirigiste* approach distorted the Diamond's balance and adversely affected global competitiveness of European industry.

In Porter's view, foreign competition is the real 'key to success'. Ultimately, it is "the outcome of the thousands of struggles for competitive advantage against foreign rivals in particular segments and industries, in which products and processes are created and improved, that underpins the process of upgrading national productivity".<sup>133</sup> Global competition forces firms to be innovative and companies achieve competitive advantage through acts of innovation.<sup>134</sup> Porter also refers to the 'MITI-syndrome' which induced countries such as the United States and the European Community to set up large government-sponsored projects. He strongly discourages blind imitation of the MITI projects. The reason that Japanese companies participate in these projects is to maintain good relations with MITI and to preserve their corporate images, not because they are likely to gain from such projects. Firms spend much more time on their own private research in the same field.<sup>135</sup> Like UNICE, Porter considers that the role of the government in improving competitiveness of firms should be restricted to creating the proper environment. It is an indirect, not a direct

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<sup>131</sup> See Porter, *supra* note 130, at 6.

<sup>132</sup> See Commission of the European Communities, *Industrial Policy in an Open and Competitive Environment*, COM (90) 556 Final, Brussels, 16 November 1990.

<sup>133</sup> See Porter, *supra* note 130, at 9.

<sup>134</sup> See Porter, *supra* note 130, at 45.

<sup>135</sup> See Porter, *supra* note 130, at 635.

role: "Government policies that succeed are those that create an environment in which firms can gain competitive advantage rather than involve government directly in the process, except in nations at early stages of competitive development. Government's most powerful roles are indirect rather than direct ones".<sup>136</sup> When a government wants to perform the right supportive role in improving competitiveness, it will have to follow a number of basic principles, such as 'stimulating innovation' and 'encouraging rivalry in the home market'. A government will have to reject any form of 'managed trade'. Managed trade guarantees a market for inefficient firms and curbs innovation.<sup>137</sup>

The mercantilism Adam Smith fought against has always remained dormant. Occasionally, it has been particularly strong, as in the 1920s and 1930s. But even as recently as the 1970s and 1980s, protectionism has been rampant. The objective of the Uruguay Round was to stop this 'new mercantilism' and to return to 'free trade'. Whether it has succeeded is too early to tell, but both the 'Banana Regulation' and the agitated reaction to it by the United States once again prove that the main trading powers will not obey GATT law if they do not feel like it. Although virtually all trade policy makers in the world are now convinced of the harmful effects of protectionism, 'domestic circumstances' still may force a government to breach international law. The important question is whether these circumstances *justify* violation. In the following section it will be analyzed in more detail why governments opt for protectionist measures. The next chapter then will address the 'justice' issue.

#### *F. The Political Market for Protectionism*

Although Adam Smith is generally considered the father of modern economics, questions of political economy as raised by Smith have been neglected for centuries by the academics in the field. Economic theorists have been occupied mainly with questions concerning the functioning of the market process. When the public sector was considered at all, they typically referred to mysterious processes, such as 'promotion of the public interest'. It always has been "tacitly assume(d) that government will in fact maximize welfare once it

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<sup>136</sup> See Porter, *supra* note 130, at 620.

<sup>137</sup> See Porter, *supra* note 130, at 669.

knows how to do so".<sup>138</sup> However, in the late 1940s a new school arose called 'public choice' (PC) in which government became the focus of study. The starting-point of PC-analysis is the assumption that the politician also is a calculating *homo economicus*, but one who happens to operate in the realm of politics rather than being active in the market.<sup>139</sup> As Anthony Downs explains, economists traditionally have applied the *homo economicus* model only to private economic agents "not because they are private, but because they are agents. In short, they are human, and the realities of human nature must be accounted for in any economic analysis. *Ipsa facto*, the same type of reasoning must be applied to every institution run by men".<sup>140</sup> According to PC-analysis, the acts of the politician are motivated by considerations of self-interest, that is, the status and the reward connected with the position. In real life, politics is not about ideology or genuine concern for the well-being of the citizen. It is about the citizen's vote. Politics is a career, as Joseph Schumpeter already knew:

Many a riddle is solved as soon as we take account of it. Among other things we immediately cease to wonder why it is that politicians so often fail to serve the interest of their class or of the groups with which they are personally connected. Politically speaking, the man is still in the nursery who has not absorbed, so as never to forget, the saying attributed to one of the most successful politicians that ever lived: "What businessmen do not understand is that exactly as they are dealing in oil so I am dealing in votes".<sup>141</sup>

George Stigler has argued that it would be extremely naive to suggest that a representative values a particular policy on the ground of 'public interest'. When voting in favour of a policy that conflicts with the public interest will provide him with the approval of a group of voters which he views as important, the honourable gentleman will not hesitate to do so. It is trite but true that the representative who is against every separate partial interest because it hurts the public interest will not be a representative for very long. Politicians are almost forced to include 'special privileges' in their election-programmes. In Stigler's own words:

The representative and his party are rewarded for their discovery and fulfillment of the political desires of their constituency by success in election and the perquisites of office. If the representative could confidently await reelection whenever he voted against an economic policy that injured the society, he would assuredly do so. Unfortunately virtue does not always command so high a price. If the representative denies ten large industries their special subsidies of money or governmental power, they will dedicate themselves to the election of a more

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<sup>138</sup> See A. Downs, *An Economic Theory of Democracy* (1956), p. 284.

<sup>139</sup> See J.W. de Beus, *Markt, democratie en vrijheid: Een politiek-economische studie* (1989), p. 216.

<sup>140</sup> See Downs, *supra* note 138, at 283.

<sup>141</sup> See J.A. Schumpeter, *Capitalism, Socialism and Democracy* (1943), in the edition of George Allen & Unwin, London (1976), p. 285.

complaisant successor: the stakes are that important. This does not mean that every large industry can get what it wants or all that it wants: it does mean that the representative and his party must find a coalition of voter interests more durable than the anti-industry side of every industry policy proposal. A representative cannot win or keep office with the support of the sum of those who are opposed to: oil import quotas, farm subsidies, airport subsidies, hospital subsidies, unnecessary navy shipyards, an inequitable public housing program, and rural electrification subsidies.<sup>142</sup>

Interest groups which represent producers lobby for support and the politician grants this support because he wants to be reelected. The consumer is left to face the music. There is a redistribution of income from the unprotected consumer, who is forced to buy more expensive products while cheaper products are available, to the protected producer. The difference in lobby force and lobby quality explains the actual level of protection in the different sectors of industry.<sup>143</sup> PC-analysis shows that the struggle between producers and consumers for the favours of the politician is inequitable. Producers are much better organized than consumers. Therefore, their lobbies are much more effective. Furthermore, import restrictions yield clearly visible benefits for producers but the costs for consumers are widespread and less visible. The import-competing producer is prepared to bear the cost of lobbying because there is so much at stake for him. Consumers usually are less motivated to protest and often do not even realize why prices rise. Thus, the very nature of the democratic process results in an intrinsic tendency towards protectionism in all democratic societies, and the parallels between competition in the democratic process and competition in the market explain why protectionism is so rampant in these societies. Most likely, the politician is aware of the benefits of free trade in the long run, but since he has only four or five years to prove himself he has a very short 'time horizon'. This leads him to favour import protection although the import barriers harm more people than they benefit and bring a net loss to the nation.<sup>144</sup> Michael Porter also has pointed to the fact that governments are inclined to make the same mistakes over and over again for the simple reason that competitive time for companies and political time for governments are at odds. Creating a competitive advantage may take more than ten years, but for politicians ten years are an eternity. For that reason, governments are more inclined to pursue policies which provide clearly visible short-term gains for firms, like subsidies and import protection. Such policies,

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<sup>142</sup> See G.J. Stigler, 'The Theory of Economic Regulation', in: G.J. Stigler, *The Citizen and the State* (1975), p. 125.

<sup>143</sup> See, e.g., Lindert and Kindleberger, *supra* note 24, at 228.

<sup>144</sup> See K.W. Abbott, 'The Trading Nation's Dilemma: The Functions of the Law of International Trade', 26 *Harv. Int'l L.J.* 501 (1985), p. 521.

however, retard the crucial process of innovation. The really intelligent policies require politicians to be patient or, even worse, "carry short-term negatives".<sup>145</sup>

In the traditional economic analysis of national welfare, it is assumed that the welfare of each country's individual is entitled to equal weight. The welfare gains and welfare losses of the various groups in society, as the corollary of decisions favouring free trade or protection, are simply added up and provide a net domestic result.<sup>146</sup> The analysis further supposes that welfare gainers can compensate welfare losers. Free trade is demonstrated to be Pareto-efficient in terms of the net welfare position of society as a whole, because a policy change from protection to liberalization would leave no one worse off while making some better off.<sup>147</sup> Public choice theory takes quite a different approach. Import-competing producers and their workers are considered 'demanders' of trade protection who are trying to maximize their incomes by getting imports reduced. Elected trade politicians are considered to be the main 'suppliers' of trade protection. They try to maximize their political support and chances of reelection. The actual level and structure of trade protection may be explained as the 'political price' that equilibrates the 'political market for protectionism'.<sup>148</sup>

### *G. Conclusion*

George Bernard Shaw once said that "if all economists were laid end to end they would not reach a conclusion". However, in the area of international trade theory there is hardly any difference of opinion. Bergsten and Cline have pointed out that: "The intellectual consensus in this area is in fact quite rare, at least within the realm of economic policy; Keynesians, monetarists, so-called supply-siders, and virtually all other schools of thought agree on the virtues of open trade".<sup>149</sup> Economic theory, numerous trade policy declarations of governments, and economic analyses conducted by international trade, financial and

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<sup>145</sup> See Porter, *supra* note 130, at 623.

<sup>146</sup> See Abbott, *supra* note 144, at 514.

<sup>147</sup> *Ibid.*

<sup>148</sup> See Petersmann, *supra* note 86, at 117.

<sup>149</sup> See C.F. Bergsten and W.R. Cline, 'Trade Policy in the 1980s: An Overview', in: W.R. Cline (ed.), *Trade Policy in the 1980s* (1983), p. 96.



monetary organizations such as GATT, UNCTAD, OECD, IMF, and the World Bank, unanimously point to the favourable national and international welfare effects of free trade.<sup>150</sup> As Jan Tumlir has written, all exceptions ever thought of "are essentially theoretical curiosities. Not only that the conditions postulated appear, on general considerations, to be exceedingly rare, they are impossible to ascertain, in the predictive sense, with any degree of reliability in practice".<sup>151</sup> Convincingly, economic analysis has shown that the costs of protectionism are higher than the sum of the advantages for national producers and the government.

Governments cannot act as distinctively useful agents in national or international markets on behalf of their constituents. Optimal national economic welfare will ensue only if the individual is left free to pursue his own economic interest. The often abundant discretionary powers of governments in the area of foreign trade policy frequently result in a harmful and inequitable redistribution of income from consumers to producers. In order to establish and maintain a liberal trading regime, a genuine safeguard needs to be found. In the interest of all citizens of the European Community, compliance with the rules that prescribe the game of international trade is absolutely necessary. Such rules were laid down in an agreement which furnished a logical legal translation of a sound economic theory. The 'defective constitution'<sup>152</sup> of GATT has been repaired, but erosion of the new framework has already begun. Simply sharpening the rules and embedding them in a new and consistent framework accomplish little when there is no effective guarantee that the rules will be obeyed in the future.

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<sup>150</sup> See Petersmann, *supra* note 86, at 113/114.

<sup>151</sup> See J. Tumlir, 'GATT Rules and Community Law - A Comparison of Economic and Legal Functions', in: M. Hilf, F.G. Jacobs and E.-U. Petersmann (eds.), *The European Community and GATT* (1986), p. 3 (note 1).

<sup>152</sup> See J.H. Jackson, *Restructuring the GATT System* (1990), Part 1.



## X

### *The Justice of EC Foreign Trade Policy*

*To prohibit a great people, ..., from making all that they can of every part of their own produce, or from employing their stock and industry in the way that they judge most advantageous to themselves, is a manifest violation of the most sacred rights of mankind.<sup>1</sup>*

#### A. Introduction

ADAM Smith has shown how nations grow rich. If people are left free in their economic endeavours, their own egotism will make sure that, via the invisible hand, the public interest is served. Protection of individual rights is essential because the individual must be allowed sufficient freedom of movement to do his job for the State. Mercantilist policy, however, throws sand in the invisible hand mechanism and, unfortunately, mercantilism is as much a threat today as it was in Smith's days. The reason for this continued threat is that the overall structure within which trade policy is conducted has not changed. Politicians still are fully exposed to interest group pressure. This has, at least, two negative consequences. The first consequence is the economic one discussed in the previous chapter, sub-optimal pursuit of economic welfare because *homo economicus* is restrained from fully developing his economic potential. The second consequence is injustice, resulting from the fact that such restraint usually involves infringement of basic individual rights, such as the right to property. This final chapter sets out to explore why, as a matter of justice, European Community law should provide a guarantee that the individual's fundamental rights in the area of foreign trade are protected. In doing so, it will draw first on the insight of such eminent scholars as James Buchanan and John Rawls and then apply their findings to the actual situation in the European Community. Finally, it will examine the question of precisely what the task of the European Court of Justice in this matter could be.

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<sup>1</sup> Adam Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations* (1776), in the edition of R.H. Campbell, A.S. Skinner and W.B. Todd, Clarendon Press, Oxford (1976), at IV.vii.b.44.

## *B. James Buchanan's Constitutionalism*

### 1. The Analytical Framework

James Buchanan views the domestic political-economic system as being constructed on three different levels: (1) a pre-constitutional level characterized by the absence of rules, in other words, anarchy; (2) a constitutional level where the rules come about and find their place in a social contract; and (3) a post-constitutional level where one acts within the rules in force under a democratic regime.<sup>2</sup> In explaining the actions and interactions of individuals within this framework, in particular their behaviour in the market, Buchanan makes use of three important elements of Adam Smith's affluent philosophy. The first element is Smith's view of human nature captured in his *homo economicus* model, which holds that all the actions of man are driven by considerations of self-interest. Buchanan fully accepts this model: "*homo economicus* offers a better basic model for explaining human behaviour than any comparable alternative".<sup>3</sup> The second element is Smith's system of natural liberty protected by rules of law. Buchanan agrees that actions and interactions in political processes should be bound by constitutional rules in order to guarantee the individual's freedom: "the fundamental role for politics, inclusively defined, is that of providing the legal framework within which individuals can go about their ordinary business of seeking to further the values they choose, without overt conflict. The enforcement of rights and contracts is a necessary task for government in any liberal regime".<sup>4</sup> The third element is Smith's invisible hand mechanism and the morality of that mechanism. Buchanan believes in the functioning of the invisible hand coupled with a justification of selfish *homo economicus* behaviour: "individuals may well behave in a totally self-interested manner in the market, precisely because the consequences of such behavior are desirable".<sup>5</sup> How do these different elements find expression in Buchanan's theory?

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<sup>2</sup> See J.W. de Beus, *Markt, democratie en vrijheid: Een politiek-economische studie* (1989), p. 268. De Beus calls Buchanan's theory dualistic since, strictly speaking, the pre-constitutional level does not form part of the system as such.

<sup>3</sup> See H.G. Brennan and J.M. Buchanan, *The Reason of Rules* (1985), p. 50.

<sup>4</sup> See J.M. Buchanan, *Liberty, Market and State* (1986), p. 255.

<sup>5</sup> See H.G. Brennan and J.M. Buchanan, "The Normative Purpose of Economic 'Science'", in: J.M. Buchanan and R.D. Tollison, *The Theory of Public Choice II* (1984), p. 387.

## 2. The Pre-Constitutional Level

Buchanan's point of departure is mankind in the 'state of nature', the Hobbesian anarchy where life is "solitary, poore, nasty, brutish and short".<sup>6</sup> At first, life in Hobbesian anarchy seems ideal, since the individual is completely free to do whatever he pleases and is not bothered by anyone. In full liberty he can pursue his own goals: "the ideal society is anarchy, in which no one man or group of men coerces another".<sup>7</sup> However, man is not perfect. He likes to force others to his will: "any person's ideal situation is one that allows him full freedom of action and inhibits the behavior of others so as to force adherence to his own desires. That is to say, each person seeks mastery over a world of slaves".<sup>8</sup> The Hobbesian conflict situation eventually will result in some sort of 'natural equilibrium' in which there exists an extremely unequal distribution of the available means of subsistence. In the due course of time, it will become apparent to everyone that this situation of natural equilibrium is very costly. The total cost of conquest and defense must be reduced so that everyone's personal welfare can be augmented. As soon as the individuals in the 'state of nature' have reached this insight, they will begin to negotiate the social contract. They will put down their weapons and introduce a system of constitutional rules in order to maintain peace.<sup>9</sup> Ultimately, nobody wants to live in Hobbesian anarchy: "At the most fundamental level, rules find their reason in the never ending desire of people to live together in peace and harmony, without the continuing Hobbesian war of each against all".<sup>10</sup> The individual with his desire for liberty knows his own emotions and understands that there must be order in society. He is "forced to acknowledge the mutual existence of fellow men, who also have values ... He simply cannot play at being God, no matter how joyful the pretense".<sup>11</sup> Evidently, the rules

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<sup>6</sup> See T. Hobbes, *Leviathan* (1651), in the edition of C.B. Macpherson, Penguin Books, Harmondsworth (1968), p. 186.

<sup>7</sup> See J.M. Buchanan, *The Limits of Liberty: Between Anarchy and Leviathan* (1975), p. 92.

<sup>8</sup> *Ibid.*

<sup>9</sup> See Buchanan, *supra* note 7, at 58/59: "In natural equilibrium, each person uses resources to defend against and to attack other persons. Each person would be better off if some of these resources could somehow be turned to the direct production of goods. The most basic contractual agreement among persons should, therefore, be the mutual acceptance of some disarmament".

<sup>10</sup> See Brennan and Buchanan, *supra* note 3, at ix.

<sup>11</sup> See Buchanan, *supra* note 7, at 1.

of the social contract must be just. In his definition of the justice of the rules, Buchanan has been inspired by John Rawls.

### 3. The Constitutional Level

#### 3.1 A Theory of Justice

According to Rawls, the most important criterion that must be met by any order of society is justice. Just like truth is the first virtue of thought, justice is the first virtue of social institutions. In Aristotle's view, the objective of politics was to achieve the 'good life'. In Rawls' opinion, however, the 'good' is too subjective a concept to be part of a political strategy. Justice is a matter of creating a framework of correct procedures so as to establish a fair social structure within which individuals can freely pursue their own goals: "Pure procedural justice obtains when there is no independent criterion for the right result: instead there is a correct or fair procedure such that the outcome is likewise correct or fair, whatever it is, provided that the procedure has been properly followed".<sup>12</sup> Rawls' model is based on a fictitious 'original position': "The idea of the original position is to set up a fair procedure so that any principles agreed to will be just".<sup>13</sup> To do so, Rawls encourages us to imagine that we must agree on the principles on which to found society from behind a 'veil of ignorance'. Behind the veil, we all are aware of the fact that we will enter a society where goods are scarce, but nobody knows his own future position within this society. Nobody knows whether he will be intelligent or stupid, male or female, black or white, protestant or catholic. And even if someone would know, he still would not know what value society would attach to such properties. As individuals we are not as bad as Hobbes considered, but still we are prompted by self-interest: "One feature of justice as fairness is to think of the parties in the initial situation as rational and mutually disinterested".<sup>14</sup> In Rawls' view we all are 'civilized egotists' with a certain sense of justice, psychology, sociology, economics and

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<sup>12</sup> See J. Rawls, *A Theory of Justice*, Clarendon Press, Oxford (1972), p. 86.

<sup>13</sup> See Rawls, *supra* note 12, at 136.

<sup>14</sup> See Rawls, *supra* note 12, at 13.

politics. In the new society to be established we all want to obtain the most favourable position possible.<sup>15</sup> Under these circumstances, how do we want society to be arranged?

Rawls argues that, from behind a veil of ignorance, rational persons will opt for a risk-averting strategy. Each person will try to obtain the most favourable position possible with as little risk to himself as possible. Rawls calls this the maximin-strategy: "the maximin rule tells us to rank alternatives by their worst possible outcomes: we are to adopt the alternative the worst outcome of which is superior to the worst outcomes of the others".<sup>16</sup> Each individual will try to protect his own liberty as much as possible, but also will want to protect the position of the weakest in society lest he should find that he belongs, quite unexpectedly perhaps, to that unfortunate group. In Rawls' view, rational persons thus will opt for an interpretation of justice which gives them the certainty that, in the event that they do belong to the weakest caste in society, they still will be able to lead a satisfactory life. On the basis of these considerations, rational individuals will opt for two specific principles of justice, the observance of which will lead to results which are morally justified. These principles are:

- (1) Each person is to have an equal right to the most extensive total system of equal basic liberties compatible with a similar system of liberty for all;
- (2) Social and economic inequalities are to be arranged so that they are both: a) to the greatest benefit of the least advantaged, ...; and b) attached to offices and positions open to all under conditions of fair equality of opportunity.<sup>17</sup>

The first principle of justice is the principle of 'equal liberty'. Examples include suffrage, the right to property, and the right not to be subjected to an arbitrary administration of justice. Rawls notes that: "These liberties are all required to be equal by the first principle, since citizens of a just society are to have the same basic rights".<sup>18</sup> The first part of the second principle (principle 2a) is the so-called 'difference principle', which states that stratification of status, power, income and property can be accepted only if such an arrangement is to the

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<sup>15</sup> See Rawls, *supra* note 12, at 137.

<sup>16</sup> See Rawls, *supra* note 12, at 152/153.

<sup>17</sup> See Rawls, *supra* note 12, at 302/303. There is a lexicographical order between the two principles on the basis of a priority formula. The first principle has priority over the second, and within the second, 2(b) has priority over 2(a). Several commentators have argued that this way of 'allocating' priorities is hardly tenable and even in Rawls' own 'general conception of justice' there is no absolute priority of freedom; this freedom is balanced against socio-economic inequalities.

<sup>18</sup> See Rawls, *supra* note 12, at 61.

benefit of the least favoured in society. Socio-economic inequalities can be justified only when the activities of those who have attained the most advantages, either by birth or by natural ability, result in beneficial effects for the least advantaged. In developing these activities there must be equality of opportunity (the second part of the second principle or principle 2b): "assuming that there is a distribution of natural assets, those who are at the same level of talent and ability, and have the same willingness to use them, should have the same prospects of success ...".<sup>19</sup> Like Adam Smith, Rawls assumes that each individual has his own life plan in which acquiring material wealth takes pride of place. By planning society in accordance with the difference principle, the least favoured can benefit from the activities which naturally follow from the rosier perspectives of the more favoured. In turn, such benefits will achieve a more equal distribution of wealth and thus more equality. In this manner, Rawls steers himself to a more general conception of justice in which issues such as liberty and welfare are balanced against socio-economic inequalities: "All social primary goods - liberty and opportunity, income and wealth, and the bases of self-respect - are to be distributed equally unless an unequal distribution of any or all of these goods is to the advantage of the least favoured".<sup>20</sup> Like Rawls, Buchanan also advances a procedural theory of justice. This viewpoint is the logical consequence of his conviction that values can be derived only from the individual: "the critical normative presupposition on which the whole contractarian construction stands or falls is the location of value exclusively in the individual human being. The individual is the unique unit of consciousness from which all evolution begins".<sup>21</sup> This notion means that he who wants to know what is in the best interest of the individual, has only one reliable source of information at his disposal, namely, the disclosed preferences of the individual himself.<sup>22</sup> For:

only the individual can experience utility and disutility, rank alternative states of welfare, formulate beliefs concerning ought-to-bes, make his way through the thicket of risk and uncertainty in the direction of an expected objective the nature of which it may be impossible for him fully to articulate to others. That which is sought for, both in politics and economics, cannot in the circumstances be anything that exists independently of the attitudes and interests, preferences and purposes of the discrete individuals who make up the society.<sup>23</sup>

Buchanan also bases his analysis on a 'veil of ignorance' image: "Essential to the analysis is

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<sup>19</sup> See Rawls, *supra* note 12, at 73.

<sup>20</sup> See Rawls, *supra* note 12, at 303.

<sup>21</sup> See Buchanan, *supra* note 3, at 21.

<sup>22</sup> See de Beus, *supra* note 2, at 265.

<sup>23</sup> See Buchanan, *supra* note 4, at 249.



the presumption that the individual is uncertain as to what his own precise role will be in any one of the whole chain of inter-collective choices that will actually have to be made".<sup>24</sup> Just like Rawls, Buchanan proceeds from the assumption that the participants in the constitutive deliberations will accord priority to an institutionalization of liberty. In practice, such an institutionalization leads to the introduction of a regime of property rights and civil rights. Buchanan's individuals also have a life plan based on the pursuit of economic wealth. Like those of Rawls, Buchanan's individuals will opt for 'distributive justice', that is, a distribution of wealth in favour of the least advantaged in society. In Buchanan's view, the rational individual will, for example, lend his support to the introduction of a system of social security and a system of progressive taxation.<sup>25</sup> Buchanan's modern version of Smith's 'night watcher's State' demands more from the State than merely a passive role. The State has to stand up for the weak. If granted sufficient economic freedom, the more favoured will provide the cake of which everyone can have a piece. Inequalities in the distribution of income are justified, since they are demonstrably beneficial to the weaker groups in society. These differences of income are the incentives which motivate *homo economicus* to set out to work each day. Like John Rawls, James Buchanan basically provides the building-stones for an ideology of the affordable 'welfare State'.

### 3.2 Justice and the Free Market Economy

As noted, Rawls considers that introduction of his principles of justice will bring about a natural tendency towards more economic equality. In Rawls' view, there is a clear link between the actions of those who are favoured and the needs of those who are not. Norman Barry agrees. Commenting on *A Theory of Justice*, he notes:

The evidence suggests that an incentives-based market system does raise the well-being of the worst off, at least in comparison with all known and practiced alternatives. While it is certainly impossible to eliminate all the advantages that some have over others, short of abolishing the family, it may be the case that the preservation of the more serious inequalities is a product of the granting of privileges by *political* authorities rather than an endogenous feature of the market system itself.<sup>26</sup>

Rawls declares himself an advocate of the free market economy because of the clear advantages of such a regime: "One of these advantages is efficiency, ... A further and more

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<sup>24</sup> See J.M. Buchanan and G. Tullock, *The Calculus of Consent* (1962), p. 315.

<sup>25</sup> See de Beus, *supra* note 2, at 383/384.

<sup>26</sup> See N. Barry, *An Introduction to Modern Political Theory* (1981), p. 135.

significant advantage of a market system is that, given the requisite background institutions, it is consistent with equal liberties and fair equality of opportunity".<sup>27</sup> James Buchanan also sees the highly positive connection between economic freedom and efficiency, and between economic freedom, efficiency, and the situation of the least advantaged. Free market competition motivates economic agents, acting with limited insight, to acquire information about the opportunities to make profit, and the price mechanism acts as the main source of this information. Economic agents are motivated to generate the best package of goods technologically feasible and offer it to the public as cheaply as possible. But to be able to do this, economic agents need a system of rules which provides stability and predictability. As David Reisman has noted, Buchanan puts main emphasis on the positive acts of *homo economicus*, who has to be able to count on a constitution: "A society with a constitution is spared the unnecessary uncertainty of not having a clue as to the nature of future public policies that will impinge themselves on the business climate - a considerable benefit to a business man trying desperately to plan".<sup>28</sup>

Buchanan also has elaborated this point. A society not only needs a constitution; it needs a constitution which provides for a free market regime. The free market economy has proven to provide the best opportunities for achieving economic wealth; a wealth which can and should benefit all people in society. Only through the rosier perspectives of some, can more economic equality be achieved. The State has all too often tried to achieve more economic equality by throwing sand in the well-oiled machinery of the market mechanism. Too often it has been suggested that the State is capable of steering the economic process into the right direction. Usually, this suggestion has proven wrong. The State is not the omniscient and benevolent philanthropist that it likes to present itself as being, but a simple bureaucratic decision-making apparatus that is insufficiently informed about the subjective costs and benefits of all parties affected by market failures.<sup>29</sup> Also as a consequence of the fact that decisions are made by politicians who are susceptible to lobby pressures, 'government failure' cannot be excluded and often will occur. As Milton Friedman has rightly noted, government intervention frequently is justified by applying a false 'double standard' to the analysis:

Perhaps the major intellectual fallacy in this area in the past century has been the double standard applied to the market and to political action. A market 'defect' - whether through an absence of

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<sup>27</sup> See Rawls, *supra* note 12, at 271/272.

<sup>28</sup> See D. Reisman, *The Political Economy of James Buchanan* (1990), p. 109.

<sup>29</sup> See de Beus, *supra* note 2, p. 413.

competition or external effects (...) - has been regarded as immediate justification for government intervention. But the political mechanism has its 'defects', too. It is fallacious to compare the actual market with the 'ideal' political structure. One should either compare the real with the real or the ideal with the ideal.<sup>30</sup>

Just like Milton Friedman, James Buchanan advocates non-intervention. He agrees that it is extremely deceptive to justify intervention by pointing to the need for action in order to protect the least favoured. In Buchanan's point of view, the State has to stay aloof for the benefit of the continuity of the economic process. The least favoured should be offered assistance without interrupting this process.

Evidently, the ideas of Smith, Buchanan and Rawls go beyond mere utilitarianism, loosely defined as the idea that a policy is good if it results in the greatest good for the greatest number of people, that is, a policy is good if it is the most efficient one.<sup>31</sup> The underlying assumption of utilitarianism is the belief that the State has the right to intervene to maximize utility or enhance wealth in society. In the view of the above-mentioned authors, however, the State usually does not have the right to intervene, not only because intervention normally does not work, but also because economic regulation typically goes beyond the legitimate scope of the State. The State must create the proper legal framework, protect basic rights - such as the rights to life, liberty and property - and has the duty to protect the position of the least advantaged in society, that is to say, the task to redistribute income to the benefit of the poor. In other words, the State must protect 'negative' rights (such as the right *not* to be killed, the right *not* to have your property taken from you without your consent, etc.), the protection of which can be achieved without violating anyone else's right and it also must protect certain 'positive' rights (for example, the right to health care and the right to education), the protection of some of which requires a redistribution scheme which may violate someone else's negative right (for example, the right to property).<sup>32</sup> Such violations of some of the negative rights of others are justified only if the overall redistribution scheme is to the benefit of the least favoured in society.

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<sup>30</sup> See M. Friedman, 'Adam Smith's Relevance for 1976', in: F.R. Glahe (ed.), *Adam Smith and the Wealth of Nations, 1776 - 1976 Bicentennial Essays* (1978), p. 14.

<sup>31</sup> See, in particular, J. Bentham, *An Introduction to the Principles of Morals and Legislation* (1789), Hafner Publishing Co., Darien, Conn. (1970), pp. 2/3.

<sup>32</sup> See R.W. McGee, 'The Moral Case for Free Trade', 29 J.W.T. 69 (1995), p. 73.

### 3.3 The Justice of Natural Liberty

James Buchanan has compared Adam Smith's theory of natural liberty with John Rawls' theory of justice. According to Buchanan, these theories largely coincide. With regard to Rawls' first principle and Smith's principle of natural liberty he notes: "these two principles or conceptions of liberty are, in practice, substantially equivalent".<sup>33</sup> The difference between them merely lies in the emphasis Rawls puts on political freedom and Smith on economic freedom.<sup>34</sup> Although Rawls assumes that the economy is a free market system,<sup>35</sup> he does not give any examples of restraints imposed on economic freedom. It is a shame, Buchanan states, that Rawls has dedicated little attention to institutions such as governmental economic regulations, especially since economists generally have neglected the study of the justice of such regulations. Economists only have studied the inefficiency of economic regulations but not their fundamental injustice: "Had they or Rawls done so, these institutions might have proved more vulnerable to criticism than they have appeared to be".<sup>36</sup> However, Buchanan argues, we may safely assume that Rawls implicitly has included these restrictions of individual freedom in his analysis and, like Smith, condemns them:

a straightforward application of either of these principles implies significant restrictions on the propriety of governmental-political interference with the freedom of individuals to make their own economic decisions.<sup>37</sup>

any attempt to apply the Rawlsian principle must lead to a condemnation of many overt restrictions on individual choices that have been and may be observed in the real world. Particular interferences that would in this way be classified as "unjust" by Rawlsian criteria would correspond very closely to those Smith classified in the same way.<sup>38</sup>

Adam Smith and John Rawls agree on the need for constitutional rules that ensure an open and free market economy: "both philosophers accept an effectively operative market economy

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<sup>33</sup> See J.M. Buchanan, 'The Justice of Natural Liberty', in: G.P. O'Driscoll (ed.), *Adam Smith and Modern Political Economy: Bicentennial Essays on the 'Wealth of Nations'* (1979), p. 124. Buchanan points out that the system of natural freedom as treated by Rawls (at pages 65 to 75) is not the same as Smith's system of natural freedom.

<sup>34</sup> See Buchanan, *supra* note 33, at 124 and 126.

<sup>35</sup> See Rawls, *supra* note 12, at 72.

<sup>36</sup> See Buchanan, *supra* note 33, at 125.

<sup>37</sup> See Buchanan, *supra* note 33, at 129.

<sup>38</sup> See Buchanan, *supra* note 33, at 124.

as a basic institution in any society that could be classified as just".<sup>39</sup> An open and free market economy implies a free trade regime as geographical borders are artificial and only thwart economic efficiency and retard economic growth. Thus, prohibition of imports and subsidization of exports are government-imposed restrictions on the market economy that would be contrary to both Smith's principle of natural freedom and Rawls' principle of equal liberty.<sup>40</sup> As Buchanan explains, a violation of the Rawlsian principle of equal liberty can be justified only when accompanied by compensation for those who suffer damage.<sup>41</sup>

Rawls' difference principle also displays a strong resemblance to Smith's theory in that both have distributive consequences. Regarding Smith's theory, Buchanan states: "the overriding objective was to increase the economic well-being of the members of the labouring classes, while adhering to the precept of justice the system of natural liberty represented".<sup>42</sup> Since a growth in world trade flows constitutes an essential condition for the domestic economic growth of countries and import restrictions retard the growth of world trade and thus economic growth, import restrictions also are unjust by virtue of Rawls' difference principle, for "institutional changes that tend to retard or stifle economic growth seem likely to harm the position of the least advantaged rather than to improve it".<sup>43</sup> The cold statistics indeed show that protectionism particularly hurts the interests of the least favoured in society. As Peter Sutherland has observed: "the effects of protection almost always fall most heavily on the poorest sections of society. It is they who, because of low income, have to spend the highest proportion of their household budget on necessities like clothing, footwear and basic food products. And it is exactly in these areas that protection is most common and intense".<sup>44</sup> In other words, protectionism not only prevents consenting adults from buying what they want to buy from whomever they want to buy it at whatever price they can agree upon,<sup>45</sup> but also redistributes wealth from the poor to domestic producers. If constitutional

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<sup>39</sup> See Buchanan, *supra* note 33, at 130.

<sup>40</sup> See Buchanan, *supra* note 33, at 125.

<sup>41</sup> See Buchanan, *supra* note 33, at 125. Applied to import quotas this means that, at the very least, the importers of the goods in question must be compensated. They will be able to show damage.

<sup>42</sup> See Buchanan, *supra* note 33, at 127.

<sup>43</sup> See Buchanan, *supra* note 33, at 128.

<sup>44</sup> See GATT, *Trade, the Uruguay Round and the Consumer*, report of 11 August 1993, p. 1.

<sup>45</sup> See McGee, *supra* note 32, at 74.

rules do not prevent such protectionism, something must be wrong.

#### 4. The Post-Constitutional Level

##### 4.1 How Can Leviathan Be Chained?

In Buchanan's view, each constitutional order sooner or later will be confronted with disruptions since there always will ensue frictions between the rules of the social contract and the dynamic reality of economics, politics and law. However, the way in which this order gradually develops in response to these disruptions may be positive or negative. In the positive case, the citizens are inspired by the disruptions to revise the social contract. In the negative case, the disruptions lead to a backsliding into anarchy.<sup>46</sup> According to Buchanan, the main disruption is caused by the fact that governments always tend to liberate themselves from the chains of the social contract, attracted as they are to 'Leviathan' status. Government wants to enforce the law but often considers itself to be above the law and thus not bound by it. Consequently, the individual begins to feel betrayed and alienation commences: "in this context it may become literally impossible for the individual to look on the state as anything other than arbitrarily repressive".<sup>47</sup> The main question for Buchanan is therefore: "if, ..., the collectivity is empowered to enforce individual rights, how is it to be prevented from going beyond these limits?"<sup>48</sup> In other words: "How can Leviathan be chained?"<sup>49</sup> Without revision, the constitutional rules lose their disciplinary function and the individual rights of the citizen become meaningless. The credibility of the State, based on the Rule of Law, is affected and a crisis of legitimacy seems inescapable.<sup>50</sup> Only when the citizens are sufficiently future-oriented to be convinced of the danger of a backsliding into

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<sup>46</sup> See de Beus, *supra* note 2, at 395.

<sup>47</sup> See Buchanan, *supra* note 7, at 96.

<sup>48</sup> See Buchanan, *supra* note 7, at 13.

<sup>49</sup> *Ibid.*

<sup>50</sup> See Buchanan, *supra* note 7, at 14.

anarchy, Buchanan argues, will the necessary revision of the constitution take place.<sup>51</sup> Safeguards need to be introduced to ensure that the State stays within the limits.

Buchanan does not doubt that rational, well-informed individuals would like to restrict both legislative and executive power. They feel a justified distrust towards the average politician. The well-informed individual knows that the pursuit of self-interest in democratic politics does not necessarily lead to a growth of economic and social welfare, and that the risk of wasteful governmental policy is always present.<sup>52</sup> As de Beus has observed, Buchanan's analysis of the functioning of liberal democracy focuses on a specific question concerning the compatibility of 'democracy' and 'market' at the post-constitutional level: "Does the interaction between political demanders and suppliers who maximize their own utility result in such government behaviour, specifically in such economic policy, that the welfare of society is maximized, the *Rechtsstaat* and the free market economy are functioning optimally, and individual rights (particularly property rights and civil rights) are retained?"<sup>53</sup> According to Buchanan, this is not the case in American society, which is characterized by 'constitutional anarchy'.<sup>54</sup> Although this sharp judgment might seem slightly exaggerated, his description is painfully accurate when applied to EC foreign trade policy. This area indeed may be viewed as constitutional anarchy "where the range and extent of federal government influence over individual behavior depends largely on the accidental preferences of politicians in judicial, legislative, and executive positions of power. Increasingly, men feel themselves at the mercy of a faceless, irresponsible bureaucracy, subject to unpredictable twists and turns that destroy and distort personal expectations with little opportunity for redress or retribution".<sup>55</sup> As noted previously, a characteristic of EC foreign trade policy is the abundant discretionary power of Council and Commission and, as Buchanan rightly observes, it simply "cannot be presumed that discretionary power possessed by agents under a particular institutional regime will be exercised in others' interests, unless there are

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<sup>51</sup> See J.M. Buchanan, *Freedom in Constitutional Contract* (1977), pp. 297/298.

<sup>52</sup> See Buchanan, *supra* note 7, at 156-161.

<sup>53</sup> See de Beus, *supra* note 2, at 417 (translation by the author).

<sup>54</sup> See Buchanan, *supra* note 7, at 14.

<sup>55</sup> *Ibid.*

constraints embedded in the institutional structure which ensure that effect".<sup>56</sup> If frictions between the constitutional rules and the dynamics of society become too serious, and the government starts behaving too much like a Leviathan, the constitution must be revised. The constitutional improvement that first comes to mind is more parliamentary influence on decision-making in foreign trade affairs. If the collectivity rules by virtue of a citizens' mandate, and this collectivity has crossed the limit, the citizens might want to increase their own influence. Jan Tumlrir has advocated such expansion of parliamentary powers.

#### 4.2 The Defects of Democracy

It is well-known that, despite 'Maastricht', the EC still suffers from a severe 'democratic deficit'. However, for argument's sake, let us assume that the Community enjoys a democratic system comparable to that of its Member States. Under those circumstances, can the Brussels Leviathan, as it is operating in the foreign trade field, be chained by increasing parliamentary and reducing executive powers? Delegation of decision-making powers to the executive means that in practice decisions are made in secrecy, that is, without public debate, and arbitrarily. Tumlrir found this difficult to accept:

The main damage, I repeat, consists in the curtailment of the political discussion. The proper criticism of the system is not that its political decisions are discretionary but that they are arbitrary ... By releasing legislatures from the obligation to discuss specific policy alternatives, we have made democratic politics a part of this opaque complexity - an infinitely complex improvisation without any common principles by which it could be guided or judged.<sup>57</sup>

Tumlrir argues that, from a democratic point of view, three important advantages are lost by delegation of all trade policy decision-making power to the executive. First, parliamentary discussion forces a compromise between conflicting interests so that a specific measure will never be advantageous solely to one group in society and harmful solely to the opposite group. Second, through parliamentary discussion the people find out what the advantages and disadvantages of a specific measure are. The discussion provides the citizen with information on the subject at issue. Third, through parliamentary discussion the citizen gains insight into the parliamentary voting ratios which allows him to hold the responsible parties

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<sup>56</sup> See Buchanan, *supra* note 3, at 65.

<sup>57</sup> See J. Tumlrir, 'International Economic Order and Democratic Constitutionalism' Quoted from R.E. Hudec, 'The Role of Judicial Review in Preserving Liberal Foreign Trade Policies', in: M. Hilf and E.-U. Petersmann (eds.), *National Constitutions and International Economic Law* 503 (1993), p. 505.



accountable in the event that the measure should appear to have a clear negative impact.<sup>58</sup>

In response to Tumlr, Robert Hudec has pointed to three important issues which could arise when trade policy would be subjected to parliamentary decision-making.<sup>59</sup> First, parliamentary discussion is no guarantee that the parliament will take the right decision. History has shown that despite elaborate discussions exceptionally erroneous decisions can be made in the area of foreign trade policy. Hudec rightly refers to the infamous Smoot-Hawley Act passed by the United States Congress in 1930. Following this Act, the United States was able to adopt the right course of action only after it delegated decision-making power to the executive. Hudec admits that it could be argued that this example proves Tumlr's third point in that the democratic process generated the correct answer. The responsible party, Congress, had to pay the price for its extreme error and another 'Smoot-Hawley' seems highly unlikely: "Indeed, Smoot-Hawley is such a good example of Tumlr's point that it probably has to be discounted as atypical. Most other protectionist legislation is not followed by the country's deepest depression in a century and then a world war".<sup>60</sup> The second matter Hudec raises is that parliamentary discussion of trade policy issues often will not lead to a correct balancing of the various interests at stake. The group that has to pay the price for protectionist measures is not visible and, moreover, politicians as well as citizens still like to think that protectionist measures only hurt foreign interests: "both politicians and public frequently share the illusion that the benefits of trade occur solely at the expense of the foreign interest. Economists may know that a 100% tariff increase on some products places other domestic producers at a competitive disadvantage, but as long as politicians and constituents do not know that, there is no incentive for compromise".<sup>61</sup> Hence, it is not evident that voters will draw their conclusions from negative economic results. Finally, Hudec's third and most decisive argument against subjecting trade policy decision-making to parliamentary discussion and powers is the fact that contemporary foreign trade policy is simply too extensive and complex to be the subject of parliamentary discussion: "the

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<sup>58</sup> See Hudec, *supra* note 57, at 503-508. See also J. Tumlr, *Protectionism: Trade Policy in Democratic Societies* (1985), pp. 14/15.

<sup>59</sup> See Hudec, *supra* note 57, at 515-517.

<sup>60</sup> See Hudec, *supra* note 57, at 516.

<sup>61</sup> *Ibid.*

mountain has gotten too big to move".<sup>62</sup> Thus, Hudec rightly concludes that parliament is not the proper institution to correct the basic failure of the *Rechtsstaat* in the area of foreign trade policy.<sup>63</sup>

There is yet another, more deeply rooted problem, namely, the scarcity of interest on the part of the average citizen in political issues that seem to be so remote to his everyday concerns.<sup>64</sup> By definition, foreign trade policy is concerned with such issues. If citizens do not care, why should representatives? They never will be held responsible for neglecting to represent the interests of citizens in an area which is not part of the citizens' range of vision. Tumlir does seem to proceed from the classical doctrine of democracy which, as Joseph Schumpeter has explained, suffers from an irrational image of human nature. In the classical doctrine, the citizen is supposed to be highly interested in and have knowledge of politics. Clearly, only under these circumstances can there be a 'political will' of the individual. Schumpeter has criticized the classical viewpoint. In his own words:

when we move (...) farther away from the private concerns of the family and the business office into those regions of national and international affairs that lack a direct and unmistakable link with those private concerns; individual volition, command of facts and method of inference soon cease to fulfill the requirements of the classical doctrine. What strikes me most of all and seems to me to be the core of the trouble is the fact that the sense of reality is so completely lost. Normally, the great political questions take their place in the psychic economy of the typical citizen with those leisure-hour interests that have not attained the rank of hobbies, and with the subjects of irresponsible conversation. These things seem so far off; they are not at all like a business proposition; dangers may not materialize at all and if they should they may not prove so very serious; one feels oneself to be moving in a fictitious world.<sup>65</sup>

Notion of reality can be observed only when matters are discussed concerning the family or the job. It also is present in a diluted form when local issues are at stake. National affairs, however, already hardly interest the average citizen. His lack of concern leads to an absence of a sense of responsibility and thus to an absence of a true political will:

This reduced sense of reality accounts not only for a reduced sense of responsibility but also for the absence of effective volition. One has one's phrases, of course, and one's wishes and daydreams and grumbles: especially, one has one's likes and dislikes. But ordinarily they do not amount to that what we call a will - the psychic counterpart of purposeful responsible action. In fact, for the private citizen musing over national affairs there is no scope for such a will and no task at which it could develop. He is a member of an unworkable committee, the committee of the whole nation, and this is why he expends less disciplined effort on mastering a political

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<sup>62</sup> See Hudec, *supra* note 57, at 517.

<sup>63</sup> *Ibid.*

<sup>64</sup> This point is related, but not identical, to Hudec's second point.

<sup>65</sup> See J.A. Schumpeter, *Capitalism, Socialism and Democracy* (1943), George Allen & Unwin, London (1976), p. 261.

problem than he expends on a game of bridge.<sup>66</sup>

In Schumpeter's view, the average citizen has a limited interest in information which does not seem to concern him directly. Apparently, Adam Smith's notion of the limited insight and interest of man also reveals itself in the political realm. The average citizen hardly cares about national affairs, let alone European or international affairs. The average citizen simply cannot perceive how these issues ever will concern him. His limited insight does not augment his analytical capacity: "the typical citizen drops down to a lower level of mental performance (...). He argues and analyzes in a way he would readily recognize as infantile within the sphere of his real interests. He becomes a primitive again. His thinking becomes associative and affective".<sup>67</sup>

Fortunately, much has changed since Schumpeter. Gradually, the citizen has become more aware of the fact that he is the citizen of a 'global village'. Nonetheless, there still exists a clear lack of comprehension in matters of foreign trade policy. The average citizen still seems unwilling to understand that trade policy decisions affect him directly. However, he is likely to become more and more informed on these issues and, eventually, he will realize that he is affected by such decisions. When the negative consequences of protectionist policies become part of the citizen's range of vision, representatives would be held responsible for their acts on a regular basis and thus there could be no objection if parliament would take matters into its own hands if it had not been for the fact that contemporary foreign trade policy is too extensive to be the subject of parliamentary discussion. Under the current circumstances, a different solution needs to be found. According to Buchanan, introduction of a principle of equality into the constitution is the only appropriate answer to his own question of how to chain Leviathan.<sup>68</sup> Indeed, a justified fear of Leviathan leads the rational citizen to opt for a constitutional principle which protects, at the very least, his property rights against arbitrary government interference. It thereby really should not make a difference whether these property rights are exercised within or beyond national borders. In the area of foreign trade, GATT law could provide Buchanan's suggested equality principle. Inclusion of GATT's principle of non-discrimination in the EC Constitution could lead to the highly necessary substantial correction by judges of EC foreign trade policy errors.

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<sup>66</sup> *Ibid.*

<sup>67</sup> See Schumpeter, *supra* note 65, at 262.

<sup>68</sup> See de Beus, *supra* note 2, at 422.

### *C. The Constitutional Functions of GATT Law*

Foreign trade policy measures operate through laws and regulations which confine or enlarge property rights of importers, exporters, producers or consumers. Import restrictions limit the rights of domestic importers and consumers to import and consume the restricted foreign goods. In addition, by distorting domestic prices as compared to world market prices, import restrictions are an incentive for the protected domestic producers to increase their production and prices. Finally, import restrictions discriminating between supplier countries also discriminate between competing domestic traders and producers (such as, processing industries) that are importing from these countries. GATT law performs constitutional functions on all these different levels.<sup>69</sup> It prescribes the rules of the game of foreign trade policy and provides for an equivalent input of the various forces in society: consumers, corporations, parliaments, trade unions, and trade policy officials. These rules enable participants to rely upon the stability and predictability of governmental action.<sup>70</sup> However, public officials responsible for trade policy often ignore binding GATT law. In exchange for political support, these officials frequently assist special interest groups and thereby regulate the economic activities of citizens and corporations in a discriminatory way. Unfortunately, the domestic 'checks and balances' in most States do not effectively curb the discretionary trade policy powers of government officials. Since discretionary government powers tend to be abused, their exercise must be constrained by more durable and rigid constitutional rules. Only genuine legal restraints on governmental regulatory powers will force public officials to pursue non-discriminatory policies that are in the long-term interest of society.<sup>71</sup>

The GATT treaty may be viewed as a set of economic policy commitments exchanged among governments. Many GATT provisions have the character of general prohibitive rules which

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<sup>69</sup> See generally E.-U. Petersmann, *Constitutional Functions and Constitutional Problems of International Economic Law* (1991), pp. 221-244.

<sup>70</sup> See J.H. Jackson, *The World Trading System: Law and Policy of International Economic Relations* (1989), pp. 87/88.

<sup>71</sup> So it may be argued that the 'invisible hand' of free market competition must, by necessity, be complemented by the 'visible hand' of the law. See E.-U. Petersmann, 'International Economic Theory and International Economic Law: On the Tasks of a Legal Theory of International Economic Order', in: R. St.J. Macdonald and D.M. Johnston (eds.), *The Structure and Process of International Law: Essays in Legal Philosophy Doctrine and Theory* (1983), p. 237.

aim to prevent the members of the WTO from formulating domestic policies which have detrimental economic effects. When properly enforced, these international norms impose constraints on the domestic political process, reduce the risk of government interventions into private transactions, and thus perform a function which is analogous to domestic constitutional law.<sup>72</sup> If the main purpose of GATT law is to provide a solution in situations in which the self-interest of politicians leads them to take actions harmful to national economic welfare and harmful to the interest of the greater part of their citizens, it only seems logical to include basic principles of GATT law in domestic constitutions.<sup>73</sup> GATT rules pursue not only important foreign policy objectives but also important domestic policy objectives. They are essentially aimed at settling conflicts, not among States, but indeed within States between the interests of domestic traders, producers, consumers, administrators and politicians. Therefore, GATT law may be perceived as "an agreed extension of liberal constitutional principles to the government powers to tax and regulate foreign trade".<sup>74</sup> The GATT provisions are a means to protect property rights and to protect the individual liberty to buy and sell goods in the best international markets. Inclusion of GATT's principle of non-discrimination in the EC constitution would ensure the protection of these rights throughout the Community and thereby provide for the highly necessary constitutional revision.

#### *D. The Task of the European Court of Justice*

##### 1. How to Prevent a Constitutional Crisis

The European Court of Justice considers the EC Treaty as the 'constitutional charter' of the European Community.<sup>75</sup> Under a constitutional regime, decisions by courts are rendered

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<sup>72</sup> See H. Hauser, 'Foreign Trade Policy and the Function of Rules for Trade Policy Making', in: D.C. Dicke and E.-U. Petersmann (eds.), *Foreign Trade in the Present and a New International Economic Order* 18 (1988), p. 28. See generally, Petersmann, *supra* note 69.

<sup>73</sup> See F. Roessler, 'Competition and Trade Policies. The Constitutional Function of International Economic Law', 41 *Aussenwirtschaft* 467 (1986), p. 471.

<sup>74</sup> See E.-U. Petersmann, 'Strengthening the Domestic Legal Framework of the GATT Multilateral Trade System: Possibilities and Problems of Making GATT Rules Effective in Domestic Legal Systems', in: E.-U. Petersmann and M. Hilf (eds.), *The New GATT Round of Multilateral Trade Negotiations* 33 (2nd. updated ed. 1991), p. 44.

<sup>75</sup> See Opinion 1/91, *Opinion delivered pursuant to the second subparagraph of Article 228(1) of the Treaty*, [1991] E.C.R. I-6084 (paragraph 21): "The EEC Treaty, ..., constitutes the constitutional charter of a Community based on the rule of law". On the 'constitutionalization' of the Treaty, see generally

objectively upon the basis of universally applied rules and fair procedures. In Max Weber's ideal model, courts are staffed by professionally trained judges whose integrity and independence are ensured by fundamental constitutional safeguards, and they form integral parts of an institutional system designed to ensure predictability.<sup>76</sup> An essential task of the judiciary in any democratic society is to accord legitimacy to the executive branch.<sup>77</sup> This legitimacy is accorded by means of correcting executive action where necessary. In the legal order of the European Community, however, the judiciary allows the executive extremely broad discretionary powers in the area of foreign trade. As argued above, EC foreign trade policy may be viewed as being conducted in 'constitutional anarchy'. The existing constitutional rules in this area, which state that EC economic policy is to be "conducted in accordance with the principle of an open market economy with free competition"<sup>78</sup> and thus require a 'liberalizing' character of foreign trade policy,<sup>79</sup> hardly have a disciplinary function, and the individual rights of, for example, Community importers importing from third countries are, in practice, often meaningless. The legitimate basis for executive action is thin, for judicial corrections are rare. In the area of foreign trade, the institutional system fails to bring stability and predictability.

The rules of GATT are an integral part of the Community's constitutional regime.<sup>80</sup> These rules also are designed to ensure predictability of executive action and they stand supreme in relation to secondary Community law. Nonetheless, the Court of Justice has consistently refused to apply these rules unless Community law specifically referred to them. Of course, the Court is not alone in its judicial timidity with regard to GATT law. Supreme courts of

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E. Stein, 'Lawyers, Judges, and the Making of a Transnational Constitution' 75 A.J.I.L. 1 (1981); G.F. Mancini, 'The Making of a Constitution for Europe', 26 C.M.L.Rev. 595 (1989).

<sup>76</sup> See J. Schmidhauser, 'Courts', in: M. Hawkesworth and M. Kogan (eds.), *Encyclopedia of Government and Politics* 293 (1992), p. 293.

<sup>77</sup> See, e.g., M. Shapiro, *Courts: A Comparative and Political Analysis* (1981), pp. 17-28.

<sup>78</sup> See, in particular, Article 3a of the EC Treaty.

<sup>79</sup> See P. VerLoren van Themaat, 'Some Propositions on the Legal Aspects of the Planned Economic and Monetary Union in its Political, Economic and Social Context Before and After the Ratification of the Treaty of Maastricht', paper presented at the conference "European Law in Context - The Future of European Integration", EUI Florence, 14-15 April 1994, p. 4. See also Article 110 EC.

<sup>80</sup> See, in particular, Joined Cases 21-24/72 *International Fruit Company and Others v. Produktschap voor Groenten en Fruit*, [1972] E.C.R. 1219, *juncto* Case 181/73 *R. & V. Haegeman v. Belgian State*, [1974] E.C.R. 449.

other trading powers do not enforce GATT law either, and there even exists a general judicial proclivity to defer to the executive branch when it comes to ensuring compliance with international norms. According to Benvenisti, comparative analysis shows that the jurisprudence of national courts "is consistent in protecting short-term governmental interests. Judges (...) are careful not to impinge with their decisions on their governments' international policies and interests".<sup>81</sup> As noted previously, the reason behind the quite common avoidance doctrines seems to be that judges generally fear that their interference might hurt the public interest by binding the executive branch to rules which do not constrain the other actors on the international plain.<sup>82</sup> They also are like prisoners in a prisoners' dilemma.<sup>83</sup> Their prisoners' dilemma, a practical exponent of their intellectual GATT dilemma described in Part 2, is that they cannot be sure that judges in such countries as the United States and Japan will cooperate and also enforce GATT law against their executives. As Benvenisti observes with respect to international law in general: "If they could have been assured that courts in other jurisdictions would similarly enforce international law, they would have been more willing to cooperate. They might have been ready to restrict their Governments' free hand, had they been reassured that other governments would be likewise restrained".<sup>84</sup> Certainly, GATT law does restrain governments. However, it only restrains them from taking decisions which are detrimental to their own people.

Concern for the protection of the Community's economic welfare, and concern for the protection of individual rights, should induce the Court of Justice to enforce GATT law against the EC executive. Courts are the only proper institutions to protect the legitimate interests of individuals and the public at large. At least judges are free from interest group pressures which so often lead to unequal representation of the various interests present in society. Judges usually will try to find rational application of the notion on which the legal norm was based. Legal norms which lay the foundation for trade liberalization possess an intellectual coherency which allows such rational analysis.<sup>85</sup> Redistributive, protectionist

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<sup>81</sup> See, e.g., E. Benvenisti, 'Judicial Misgivings Regarding the Application of International Law: An Analysis of Attitudes of National Courts', 4 E.J.I.L. 159 (1993), p. 161.

<sup>82</sup> See also Benvenisti, *supra* note 81, at 173.

<sup>83</sup> See Benvenisti, *supra* note 81, at 175.

<sup>84</sup> *Ibid.*

<sup>85</sup> See Hudec, *supra* note 57, at 513.

norms, on the other hand, are only pragmatic and, per definition, inconsistent. They are characterized by general criteria which allow broad discretionary powers to those who have to apply them. This delegation is often so broad precisely because the norm does not have a coherent objective. Protectionist laws are based on claims by some interest group that they need protection against foreign competition. The interest group is interested in results, not in theory. The government satisfies its demands by enacting protectionist legislation, but it cannot give a sound definition of the economic rationale on which the protectionist law was based, because such definition does not exist. The legislation in question utilizes criteria which sound very scientific and analytical, but which assume the existence of underlying norms which are just not there.<sup>86</sup> Such policies cannot flow from a comprehensive view of the public interest:

Consider any one of these decisions in isolation. Which industry needs or deserves protection rather than another? Who should and who should not receive a subsidy? (...) All these issues entail decisions about transferring income and wealth from society at large to some identifiable group, and there is no theory, no method, no set of systematically applicable criteria for deciding. Each decision of this kind is an ad hoc value judgment.<sup>87</sup>

Paraphrasing James Buchanan, it could be argued that: "Just as an alcoholic might embrace Alcoholics Anonymous, so might a nation drunk on protectionism embrace the WTO".<sup>88</sup> An open review of the compatibility of GATT principles with protectionist norms would make sufficiently clear why the latter should be struck down. Inclusion of GATT's non-discrimination principle in the EC Constitution would signify a major constitutional revision in the foreign trade field and could prevent a constitutional crisis in this important area of EC activities. The European Court of Justice has a great experience with legal norms based on coherent economic principles. Although the EC Treaty does not comprise a detailed set of instructions, the Court has managed to act energetically in giving a specific content to the general mandate.<sup>89</sup> In the field of the free flow of goods an extensive case-law has evolved. From this case-law it appears that the Court of Justice has accorded pride of place to the principle of consumer preference.

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<sup>86</sup> See Hudec, *supra* note 57, at 512.

<sup>87</sup> See J. Tumlir, 'Economic Policy as a Constitutional Problem', Harold Wincott Memorial Lecture, London, 25 October 1984. Quoted from Hudec, *supra* note 57, at 510.

<sup>88</sup> See J.M. Buchanan and R. Wagner, *Democracy in Deficit* (1977), p. 149: "Just as an alcoholic might embrace Alcoholics Anonymous, so might a nation drunk on deficits and gorged with government embrace a balanced budget and monetary stability".

<sup>89</sup> See Hudec, *supra* note 57, at 513/514.



## 2. The Recognition of Consumer Preference

The Court's energetic elimination of quantitative restrictions imposed by EC Member States on the free flow of goods within the European Community is based on Article 30 of the EC Treaty, which provides that: "Quantitative restrictions on imports and all measures having equivalent effect shall, without prejudice to the following provisions, be prohibited between Member States". Like many Treaty provisions, Article 30 is a specific expression of the general principle of non-discrimination laid down in Article 6 EC. Article 36 EC contains a list of potential justifications for *prima facie* violations of Article 30 or 34. Only rarely have Member States attempted to justify actual import quotas. The policy makers of the various States must have realized that such attempts were bound to falter, as quantitative restrictions are fundamentally incompatible with the notion of free trade on which the common market is based.<sup>90</sup> For that reason, the prohibition of 'measures having equivalent effect to a quantitative restriction' has been of greater importance in practice. As national policy makers proved themselves extremely creative in inventing measures that could restrict imports in order to please national producers, the European Court of Justice was faced with the important task of determining the scope of the prohibition.

The Court's case-law is based on the so-called 'Dassonville-formula'. In *Procureur du Roi versus Dassonville*<sup>91</sup> the Court laid down the standard definition of the scope of Article 30 EC by declaring that it will ban as measures having equivalent effect "all trading rules enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade".<sup>92</sup> With this broad formulation the Court showed that it was determined to strike down as many restrictions as possible in order to give real meaning to the prohibition of Article 30 and to the fundamental objective of market integration as laid down in Articles 2 and 3 of the EC Treaty. Within the Article 30 jurisprudence of the Court, it makes a difference whether a Member State imposes a measure

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<sup>90</sup> Moreover, most of these policy makers probably had already been involved in the drafting of amendments to national legislation required in order to bring this legislation in conformity with Article XI of GATT, which also contains a prohibition of quantitative restrictions. Maintaining quantitative restrictions within the stricter framework of Community law must have seemed illogical.

<sup>91</sup> Case 8/74 *Procureur du Roi v. Benoît and Gustave Dassonville*, [1974] E.C.R. 837.

<sup>92</sup> [1974] E.C.R. 837, at 851 (paragraph 5).

which distinguishes between domestic and imported goods, that is to say, is distinctly applicable, or whether it imposes a measure which is equally applicable to both domestic and imported goods, that is to say, is indistinctly applicable. Distinctly applicable measures, which directly discriminate against imported products, usually have been struck down by the Court for the obvious reasons, unless justification could be found under Article 36. The progressive neo-liberal approach of the Court becomes more apparent when we look at how it has dealt with indistinctly applicable measures. It appears that even in such cases the Court has clung to its ideology. Usually, it has even declared unlawful measures which only discriminated indirectly against imported products. Only under strictly defined circumstances, it has permitted indirect discrimination. In practice, arguments advanced to justify indistinctly applicable measures discriminating between domestic and imported goods typically have been based on the so-called 'rule of reason'. The 'rule of reason' was adopted by the Court of Justice in its *Cassis de Dijon* judgment.<sup>93</sup> In *Cassis*, the Court aligned its position with that of the Commission in Directive 70/50, which already provided that indistinctly applicable measures should be permitted if they could be considered as serving certain legitimate ends.<sup>94</sup> For various reasons, States may, for example, want to set different technical standards on products. The Court held that, in the absence of common rules in the field:

Obstacles to movement within the Community resulting from disparities between the national laws relating to the marketing of the products in question must be accepted in so far as those provisions may be recognized as being necessary in order to satisfy mandatory requirements relating in particular to the effectiveness of fiscal supervision, the protection of public health, the fairness of commercial transactions and the defence of the consumer.<sup>95</sup>

If the Member State can demonstrate that such a necessity exists, the measure may be upheld. However, the measure always must be proportional and the least restrictive measure possible. If an alternative measure can satisfy the objective in view - for example, a label on the product in question - this alternative measure should be chosen instead of the measure at issue.

On the one hand, *Cassis de Dijon* confirmed the liberal route the Court of Justice was determined to follow. Although it generally had been assumed that the Member States would

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<sup>93</sup> Case 120/78 *Rewe-Zentral v. Bundesmonopolverwaltung für Branntwein*, [1979] E.C.R. 649.

<sup>94</sup> See J. Steiner, 'Drawing the Line: Uses and Abuses of Article 30 EEC', 29 C.M.L.Rev. 749 (1992), pp. 752/753.

<sup>95</sup> [1979] E.C.R. 649, at 662 (paragraph 8).

be able to maintain indistinctly applicable measures until common rules would be enacted, the Court refused to await harmonization. It decided to interpret the prohibition contained in Article 30 broadly, that is, in the true spirit of the 'grand design'. On the other hand, *Cassis* denoted a first self-imposed tempering of the Court's enthusiasm.<sup>96</sup> In allowing what is, in principle, a boundless expansion of the grounds for justification listed in Article 36, the Court made a concession to the Member States. It created an extra escape clause. The Court had to admit that certain national interests - for example, the environment - could indeed justify restrictive import measures. Nevertheless, the Court remained strict. Not very often has it seen the need for protection of 'mandatory requirements'. Usually, it has referred to the possibility of taking alternative measures. In that sense, there is a clear parallel with Article 36 which also has been construed narrowly.<sup>97</sup>

A basic principle underlying the Court's Article 30 jurisprudence has been the principle of consumer preference. By taking a strict neo-liberal approach, the Court propagated that the choice for a product should be determined by the person to whom the product is offered for sale, the consumer, and not by the company that manufactures the product. National producers should under no circumstances be allowed to force their products upon the consumer. The product's country of origin should be irrelevant. The consumer should be free to choose and make the decision whether to purchase a product solely on the basis of his own interest and budget. The State should not try to make that decision for him by excluding imported products from his range of choice. If a product is lawfully produced in one particular Member State it must, in principle, be allowed to move freely within the Community.<sup>98</sup> As the rules of GATT provide for a liberalization of trade between the members of the WTO, they merely further enhance the choice of European consumers. Rationally viewed, the Court therefore should 'transpose' the ideology of its *Dassonville* and *Cassis de Dijon* jurisprudence to the rich domain of external trade. In practice, such transposition would mean that measures which directly discriminate against goods originating in the territory of (third) WTO members would be assessed on the basis of a

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<sup>96</sup> A second came with *Keck*; Joined Cases C-267/91 and 268/91 *Bernard Keck and Daniel Mithouard*, [1993] E.C.R. I-6097. See J. Stuyck, 'L'arrêt Keck et Mithouard (vente à perte) et ses conséquences sur la libre circulation des marchandises', 30 *Cahiers de droit européen* 435 (1994).

<sup>97</sup> See, in particular, Case 72/83 *Campus Oil v. Minister for Industry and Energy*, [1984] E.C.R. 2727.

<sup>98</sup> See, e.g., S. Weatherill and P. Beaumont, *EC Law: The Essential Guide to the Legal Workings of the European Community* (1993), pp. 436/437.

formula akin to the broad *Dassonville*-formula, including possible limitations on the global free flow of goods provided for in GATT law, for example, under Article XX, which is couched in terms similar to those of Article 36 EC. Indistinctly applicable measures which nonetheless discriminate would be determined on the basis of a 'rule of reason', that is to say, protection of certain mandatory requirements - particularly in the area of environmental protection - could justify restrictions on importation of goods originating in third countries. Under no circumstances, however, should the Court be less strict only because the goods in question originate in third countries and not in an EC Member State.

The first step the Court of Justice ought to take is the granting of direct effect to certain basic rules of GATT law, for example, Articles I, III and XI. The Community has benefited greatly from the direct effect of Article 30 EC and although the issues which will arise might be complicated at times, they will not differ all that much from the issues which already have been decided by the Court under that provision. *Deja-vu* perceptions of the judges will no doubt contribute to an effective demolition of the walls of Fortress Europe. Indeed, the main reason the judges have been able to act in a progressive neo-liberal fashion is the coherence of the free trade principles to which these legal norms gave expression. Similarly, the GATT non-discrimination principle (as well as GATT's other main principles) entails a mandate, consistent from one case to the other and based on economic concepts already clear to the Court of Justice and the national courts: "the fact that courts begin with a clear mandate to remove as many barriers to trade as possible, resting on a well-developed economic theory, provides an anchor for analysis that is consistent from one case to the next. The direction is clear, the burden is clear. It is a policy courts can execute".<sup>99</sup>

### *E. Conclusion*

All the actions of man are driven by considerations of self-interest and there is nothing wrong with that as long as society as a whole, in particular the group of the least advantaged, benefits from this selfish behaviour. It is the task of the State to provide the proper constitutional framework within which individuals are free to choose. A trader should be free to choose his business partner, a consumer should be free to choose a product without being restrained by an artificially high price - borders just don't matter. Only a constitution

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<sup>99</sup> See Hudec, *supra* note 57, at 514.

which provides for an open and free market economy is consistent with John Rawls' principles of justice and Adam Smith's principle of natural liberty. A constitution such as that of the European Community which only in theory, but not in practice, provides for an open and free market economy, and allows flagrant infringements of fundamental rights, such as the right to property, runs the risk of ultimate rejection by the constituency and surely needs to be revised. Inclusion of GATT's non-discrimination principle in the EC constitution would provide for the necessary revision. The Brussels Leviathan can only be chained by inserting a supreme principle of equality into the EC constitution. As Article 6 EC does not appear to have an external exponent, recognition by the European Court of Justice of the direct effect of Articles I and III of GATT would denote such inclusion.

It is sometimes argued that the executive should have broad discretionary powers in external relations, *because* international norms were not approved by the parliament. Therefore, it should be the executive branch which must protect the interests of the citizens in the international arena and courts should stay aloof. However, it has been countered convincingly that courts can and must distinguish between a 'horizontal model' in which conflicting national interests are at issue, and the 'vertical model' in which individual interests are at stake like, for example, in human rights matters.<sup>100</sup> GATT law is 'vertical' since it contains constitutional principles which protect individual rights. In that sense, it is not much different from the European Convention. Enforcement of GATT law protects citizens and does not hurt other legitimate domestic interests. Such enforcement would enhance the protection of fundamental rights in the European Community and serve the Community public interest. It seems that the Court of Justice hardly has a choice but to enforce GATT law. The Court is at a crossroads and time is running out. Once again the Court will have to take a firm stance and show it is capable of making a difference. It will have to show that it is willing to conduct a genuine *Hauer* test and prove that it will not stick to its meaningless dilution. It will also have to show that it is willing to apply GATT law and prove that it has the courage to stand up for traders against the EC executive in foreign trade policy matters. It would only be doing itself a favour, for it would no longer have to spend valuable time searching for non-existent rationality in inequitable redistributive legislation. The Court's future GATT case-law should evolve along *Dassonville/Cassis de Dijon* lines and have at its center recognition of the principle of consumer preference, for "consumption is the sole end and purpose of all production; and the interest of the producer ought to be attended

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<sup>100</sup> See Benvenisti, *supra* note 81, at 174 (note 81).

to, only so far as it may be necessary for promoting that of the consumer. The maxim is so perfectly self-evident, that it would be absurd to attempt to prove it".<sup>101</sup>

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<sup>101</sup> See *The Wealth of Nations*, *supra* note 1, at IV.viii.49.



## XI

### *Summary and Conclusion*

*Whereupon she who saw me as I saw myself, to quiet my perturbed mind, opened her lips before I opened mine to ask, and began, "You make yourself dull with false imagining, so that you do not see what you would see had you cast it off".<sup>1</sup>*

#### *A. The Historical Dimension*

The negative downward spiral of the economic nationalism of the 1920s reached a low point in 1930 when the United States enacted the infamous Smoot-Hawley Act.<sup>2</sup> This protectionist legislation deepened the Great Depression, the worldwide economic crisis which enabled Adolf Hitler to gain sufficient domestic support to start his deplorable project. It did not take the United States very long to admit its mistake. In 1934, Franklin Delano Roosevelt launched a plan, devised by his right hand man Cordell Hull, to lower barriers to trade on a worldwide scale in order to achieve stability in international relations and increase economic welfare.<sup>3</sup> It was Cordell Hull, in particular, who realized that mutually beneficial economic cooperation would knit closer ties between countries than ever would be possible through mere political declarations of good intent. In close cooperation with its main trading partner, the United Kingdom, the United States drafted the multilateral trade agreement which came to be known as the GATT. For almost half a century, this agreement formed the basis of a multilateral trading system based on non-discrimination. GATT sought to promote world peace and prosperity through economic cooperation on a non-discriminatory basis, the realization of Cordell Hull's dream. Its aim was to end, once and for all, mutually destructive protectionist policies. Recently, GATT's institutional role was taken over by the World Trade Organization. The establishment of an official organization for world trade reflected a new

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<sup>1</sup> See Dante Alighieri, *The Divine Comedy* (1320), translated by Ch.S. Singleton, Bollingen Series LXXX, Princeton University Press (1977), Paradiso, Canto I (Beatrice's advice to Dante who is trying to ascend to Paradise).

<sup>2</sup> Tariff Act of 1930, 46 Stat. 590.

<sup>3</sup> Reciprocal Trade Agreements Act; Act to Amend the Tariff Act of 1930, Part III, 48 Stat. 943. The RTA program established a network of bilateral agreements.



firm commitment to conduct international trade relations on the basis of the 'Rule of Law' and strive for a true "optimal use of the world's resources" and a true "raising [of] standards of living".<sup>4</sup>

The negative downward spiral of the economic nationalism of the 1920s met its Lucifer between 1939 and 1945, when the European continent was occupied and governed by Hitler's Third Reich. Eventually, the allied forces emerged victorious, but the victory could not provide an immediate solution to Europe's problems. French fear of German economic recovery thwarted opportunities for a positive European economic policy. The 1950 Schuman Plan, devised by Robert Schuman's right hand man Jean Monnet, attempted to solve the impasse.<sup>5</sup> Just like Cordell Hull, Jean Monnet emphatically believed in economic cooperation as a vehicle for peace and prosperity. The Schuman Plan represented both a political attempt to prevent yet another war on the European continent and an economic initiative to make Europe prosperous by establishing a common market between European countries. The WTO and the European Community share the same basic dual objective of achieving peace and prosperity through economic cooperation on a non-discriminatory basis, albeit at different geographical and ideological levels. But, logically speaking, peace can be pursued only on a global level. Obviously, peace between the countries of Europe does not guarantee peace in Europe. Likewise, optimal prosperity can be pursued only on a global level. The economic theory underlying the efforts towards European economic integration is based on reaping the full advantages of economies of scale. There is a whole world of business opportunities beyond the borders of Europe. Like peace, trade liberalization is generally considered an 'international public good', a benefit which a State ought to grant its citizens.<sup>6</sup> The citizens of the Member States not only benefit from a removal of trade barriers between the Member States, but also have a clear interest in a removal of trade barriers between the Community and third countries. Despite political statements to the opposite, it appears that the European Community is still reluctant to pursue trade liberalization to its logical extent. The degree to which the European Court of Justice is willing to become involved in the debate is decisive in moving from the second to the third stage of European economic integration.

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<sup>4</sup> See the Preambles to both GATT 1947 and the WTO Agreement.

<sup>5</sup> See, in particular, W. Diebold, *The Schuman Plan: A Study in Economic Cooperation 1950-1959* (1959).

<sup>6</sup> See, e.g., Ch.P. Kindleberger, *The International Economic Order: Essays on Financial Crisis and International Public Goods* (1988), p. 133.

### *B. The Status of GATT in European Community Law*

The status of GATT law in the legal order of the European Community is determined by the European Court of Justice. This status, the main factor in the process of moving from the second to the third stage of European economic integration, depends on the Court's position on four points: the direct applicability, the direct effect, the supremacy and the interpretation of GATT provisions in European Community law. Part 1 of this study has analyzed these four points by making a comparison of the Court's position on these issues in this context and its position on the same issues when they arise both in the relationship between Community law and national law and in the relationship between Community law and international law in general.

#### *Direct Applicability*

It appears that the Court of Justice takes a monist view of the relationship between Community law and the law of the Member States. Community law forms an integral part of the legal systems of the Member States, and there is, in principle, no need or even room for transformation of Community norms into national law. The Community legal system simply cannot allow the adoption of national legislative measures capable of jeopardizing its objectives. This is why the Court held in *Costa v. ENEL* that the Treaty has created "its own legal system which on the entry into force of the Treaty, became an integral part of the legal systems of the Member States and which their courts are bound to apply".<sup>7</sup> Like the relationship between Community law and national law, the relationship between international law and Community law is monist. In principle, there is need nor room for transformation of the international norm into Community law. In *Haegeman*, the Court of Justice explicitly made clear that international agreements concluded by the Community also form an integral part of Community law.<sup>8</sup> Although GATT 1947 was not an international agreement concluded by the Community, the Court decided that it was binding on the Community as such and accordingly implied that its provisions also formed an integral part of Community law.<sup>9</sup> Technically speaking, the direct application of the new GATT 1994 is

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<sup>7</sup> [1964] E.C.R. 585, at 593.

<sup>8</sup> [1974] E.C.R. 449, at 460 (paragraph 5).

<sup>9</sup> See Joined Cases 21-24/72 *International Fruit Company and Others v. Produktschap voor Groenten en Fruit*, [1972] E.C.R. 1219. Joined Cases 267-269/81 *Amministrazione delle Finanze dello Stato v. Società Petrolifera Italiana SpA (SPI) and SpA Michelin Italiana (SAMI)*, [1983] E.C.R. 801.

different from that of the old GATT 1947. GATT 1994 is one of the integral parts of the WTO Agreement which was concluded by the Council under Article 228 of the EC Treaty. GATT 1994 is for that reason binding on the Community and on the Member States and, consequently, its provisions form an integral part of Community law.

It appears from the Court's case-law that there are two main reasons why the Court has opted for the monist approach to the relationship between international law and Community law. First, the Court is concerned with the unity of the Community. It wants the Member States to yield to the higher, central Community level. Therefore, it simply cannot accept any difference between Member States in the application of international law. In practice, application of international law may fall partly within the competence of the Member States. In such a case, the impact of the treaty would differ greatly from State to State since the mandates of national judges differ throughout the Community. Any difference in application of GATT would seriously imperil the unity of the common commercial policy. Direct applicability permits the Court to ensure the uniform application of GATT throughout the Community. Second, the Court appears to be concerned with the Community's proper performance of its obligations under international law. The Community bears the responsibility for its international obligations, yet the actual performance of these obligations often is up to the Member States. Thus the Community must be able to count on the Member States not to violate the treaties to which the Community is a party. As the Court held in *Kupferberg*: "in ensuring respect for commitments arising from an agreement concluded by the Community institutions the Member States fulfil an obligation not only in relation to the non-member country concerned but also and above all in relation to the Community which has assumed responsibility for the due performance of the agreement".<sup>10</sup> Direct application of treaties in Community law indeed provides for a better guarantee that the obligations under the treaty are properly fulfilled. However, the Court should be concerned not only with the proper performance of international obligations by the Member States. It also ought to be concerned with the due performance of international duties by the Community itself. By taking the monist route, the Court not only has committed itself to ensure the proper performance of international law by the Member States as an obligation under Community law, but it also has committed itself to ensure proper performance by the Community of the international obligations at issue. This performance is a commitment under international law in respect of third countries, as well as a commitment under Community law in respect of

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<sup>10</sup> [1982] E.C.R. 3641, at 3662 (paragraph 13).

the Member States, particularly when GATT obligations are under scrutiny. The Court of Justice ought to remember that the Member States are parties to GATT, and members of the WTO, and that any violation of GATT law by the Community affects the Member States directly and may seriously embarrass them at the international level. The Member States do have obligations of their own in relation to non-member States that are members of the WTO, that is to say, virtually the rest of the world.

### *Direct Effect*

Genuine concern for the due performance of international obligations entails utilization of all the possible instruments to ensure such performance. The main advantage of the monist approach is that international law can be viewed as a self-imposed restraint on governments, not only for the sake of the *pacta sunt servanda* but, first and foremost, for the sake of a better functioning of the domestic legal system, for example, a better protection of individual rights. An important instrument to ensure proper performance is 'direct effect'. If a court allows private parties to invoke international law, it shows that it is willing to help the executive branch comply with international obligations. It shows that it is willing to extend the protection of individuals by granting them an additional source of law from which to draw arguments, and it shows that it is willing to grant them their day in court, in other words, 'access to justice'. As regards Community law in its relationship to national law the Court has held that Community law is, by its very nature, intended to confer rights upon individuals which they can invoke in court. In *Van Gend & Loos* the Court declared that the Treaty "is more than an agreement which merely creates mutual obligations between the contracting States" and that these States "have acknowledged that Community law has an authority which can be invoked by their nationals before [national] courts and tribunals".<sup>11</sup> Although the Court has declared that international agreements of the Community also may produce direct effect in appropriate cases,<sup>12</sup> it refuses to recognize the direct effect of GATT.<sup>13</sup> In the literature, this latter line of case-law has come under serious attack.

It appears that the main arguments of the Court of Justice to deny direct effect to GATT are related to the nature and structure of the General Agreement. The Court seems to argue

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<sup>11</sup> [1963] E.C.R. 1, at 12.

<sup>12</sup> Case 104/81 *Hauptzollamt Mainz v. C.A. Kupferberg & Cie.*, [1982] E.C.R. 3641.

<sup>13</sup> Joined Cases 21-24/72 *International Fruit Company and Others v. Produktschap voor Groenten en Fruit*, [1972] E.C.R. 1219.

along the following lines. The GATT system is based on the principle of reciprocity: its main objective is to maintain the initial balance of rights and obligations between the parties through negotiations. Granting direct effect would hamper the Community executive in these negotiations, especially if the courts of other important trading partners, such as the United States and Japan, would not permit direct effect of GATT. Furthermore, GATT's structure is weak. The principle of 'self-help' applies, that is, safeguard measures can be taken unilaterally, without the consent of the other parties. Also GATT's dispute settlement procedure is characterized by great flexibility. The parties always aim for a diplomatic solution through negotiations and the elimination of an alleged GATT infringement is not considered essential. Therefore, violations of GATT provisions are often tolerated. Interference with the dispute settlement procedure by judgments of the Court of Justice would jeopardize the position of the Community in these proceedings. Granting direct effect to GATT would entail a shift of power within the Community legal system from the executive to the judiciary. Such a power shift would impede the Community's ability to give an immediate and appropriate reaction to violations of GATT by other parties.

In the view of the Court, the legal nature of an international agreement depends on two interrelated reciprocity issues: maintenance of the initial balance of obligations and reciprocity in enforcement. It remains unclear, however, why the Court considers these issues important. The only possible explanation seems to lie in a persistent adherence to the traditional mercantilist, negative and defensive view of foreign trade policy. In this traditional view, foreign trade policy is a matter of international affairs. At the international level, conflicts between national trade interests typically are settled in an amicable manner through diplomatic channels. This approach is based on the belief that there are substantial areas of conflict between trading nations. International trade law must provide each country with ample safeguards against trade policies of other countries that try to further those countries' national interests but are harmful to the rest of the world. Since national constitutions have traditionally focused on 'nation-building', that is, on protecting territory disputed by foreign aggressors, national constitutions often display this defensive attitude towards foreign countries.<sup>14</sup> In the economic area, the animosity translated into a mercantilist attitude proceeding from the assumption that economic interests had to be defended and could be pursued only at the expense of other countries. Indeed, if international economic law is seen

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<sup>14</sup> See E.-U. Petersmann, 'National Constitutions and International Economic Law', in: M. Hilf and E.-U. Petersmann (eds.), *National Constitutions and International Economic Law* (1993), p. 6.

as the result of struggles for economic advantage, the decision whether or not to comply with international economic obligations must remain within the discretion of a government. A greater role of private parties in the enforcement of this law will hamper the government in its attempts to defend the national interest against those governments that do not find their hands similarly tied.<sup>15</sup> In this view, governments must be allowed to raise import barriers whenever they feel it is necessary and interference of courts should be avoided. Governments should be able to break the law in order to stop other governments from breaking the law. Economic analysis, however, has proven that protectionism not only protects domestic import-competing producers, but hurts domestic importers, processing industries, consumers, taxpayers and, in the aggregate, the economy at large. Maintenance of some kind of initial balance (which is extremely difficult to properly assess anyhow) and lack of enforcement in other countries cannot be sufficient reason to deny direct effect of GATT in Community law. The Court of Justice should be concerned with the public interest of the Community and with the individual rights of Community traders and consumers. Concern for the welfare of Community citizens and their legal protection may not depend on the attitude of courts in other legal systems. The true reason that the political institutions do not want to have their hands tied is that they wish to retain the freedom to confer special favours on specific industries, not because they are convinced that they are capable of better serving the public interest by retaining such freedom.

In the view of the Court, the various structural or institutional elements of a treaty also are important in assessing its ability to produce direct effect. The two main elements are the flexibility or rigidity of the safeguard clauses of the agreement and the functioning of its dispute settlement procedures. GATT's structure is not as weak as the Court likes us to believe. The waiver provision of Article XXV:5 never has been a good example to prove the flexibility of GATT and under the new WTO regime it has become even more difficult to obtain a waiver.<sup>16</sup> By claiming that the safeguard clause of Article XIX is too flexible, the Court mistakes GATT law for GATT practice. The safeguard clause itself never has been flexible and the principle of self-help never has applied. The fact is that, at least for more than two decades, the GATT contracting parties largely have ignored the safeguard provisions of GATT. Instead, they frequently have turned to relief measures outside the

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<sup>15</sup> See F. Roessler, 'Competition and Trade Policies. The Constitutional Function of International Economic Law', 41 *Aussenwirtschaft* 467 (1986), p. 467.

<sup>16</sup> See Article IX:3 WTO.

GATT framework and have ignored the safeguard clause of Article XIX. By granting direct effect to GATT, the Court would have helped to put a halt to this neglect of the law. Instead, it took the rather peculiar view that this neglect was a sign of GATT's institutional weakness. The Commission's circumvention of Article XIX in order to give instant service to inefficient Community industries via negotiation of voluntary export restraints with countries that did know how to produce efficiently, like Japan, was construed as a sign of GATT's institutional weakness. However, if a sign at all, such circumvention was rather a sign of the Community's own institutional weakness. At any rate, the new Agreement on Safeguards reinforces the safeguard disciplines. It explicitly prohibits grey area trade restrictions and forms a true example of the new firm commitment to adherence to the law, subscribed to by the Community.

The GATT dispute settlement procedure already had proven to be one of the most effective dispute settlement systems existing in any international organization. The controversies mainly have been caused by conflicts over substantive GATT provisions and not by significant deficiencies in the dispute settlement procedure.<sup>17</sup> The only real drawback of the system was the fact that panel reports could be blocked by the losing party. This has now changed. Although the procedure still does not allow for recourse to an international judicial body, it comes very close to doing so. Adoption of panel reports is done by a political body, but this adoption is quasi-automatic, since adoption can be blocked only by consensus. No longer can it be maintained that GATT involves rules which are enforced only by way of diplomatic negotiations. The dispute settlement system matured and now closely resembles an actual judicial system. The new firm commitment to legalism, reflected in the improvement of both the main safeguard clause and the main dispute settlement procedure, simply cannot be ignored by the Court.

Granting direct effect to GATT also would make the Court's case-law more consistent. The Court never has considered lack of reciprocity, the presence of more or less flexible safeguard clauses, or the use of traditional dispute settlement procedures sufficient reason to deny direct effect of other international agreements. In *Kupferberg*, the Court granted direct effect to provisions of a simple free trade agreement, declaring that lack in enforcement could not

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<sup>17</sup> See E.-U. Petersmann, 'Strengthening GATT Procedures for Settling Trade Disputes', 11 *The World Economy* 55 (1988), pp. 67 and 69.

constitute an obstacle to recognition of direct effect.<sup>18</sup> In *Kupferberg* and *Sevince*, the Court of Justice stated that the presence of a (flexible) safeguard clause was not sufficient in itself to affect the direct effect which may attach to certain provisions of the agreement.<sup>19</sup> And, again in *Kupferberg*, the Court held that "the mere fact that the contracting parties have established a special institutional framework for consultations and negotiations inter se in relation to the implementation of the agreement is not in itself sufficient to exclude all judicial application of that agreement".<sup>20</sup> Transposition of the Court's case-law concerning the direct effect of Community law proper to international agreements binding the Community has not had any favourable consequences for GATT. Despite the fact that the General Agreement contains many rules which easily can satisfy the Court's direct effect test, the provisions of GATT are instead treated as the 'children of a lesser God', not worthy of the Court's attention.

### *Supremacy*

As regards the supremacy issue, the Court appears to adopt an approach with respect to GATT that is more consistent with its approach to other international agreements. It has held that, as a corollary of its direct effect in principle, Community law must have priority over the domestic law of the Member States.<sup>21</sup> Community law cannot be allowed to vary from Member State to Member State. Such would be the case if subsequent national legislation could override Community law. The case-law of the Court of Justice further indicates that in case of conflict between provisions of an international agreement and Community law, precedence will be given to the law deriving from the international agreement.<sup>22</sup> Similarly, the Court's case-law reveals that it considers GATT law supreme to secondary Community law and to national law.<sup>23</sup> Just like international law in general, GATT law is ranked below the EC Treaty but prevails over conflicting rules of secondary Community law and Member State domestic law, whether enacted before or after the entry into force of the GATT

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<sup>18</sup> [1982] E.C.R. 3641, at 3663/3664 (paragraph 18).

<sup>19</sup> [1982] E.C.R. 3641, at 3664 (paragraph 21); [1990] E.C.R. I-3461, at I-3504 (paragraph 25).

<sup>20</sup> [1982] E.C.R. 3641, at 3664 (paragraph 20).

<sup>21</sup> Case 6/64 *Costa v. ENEL*, [1964] E.C.R. 585.

<sup>22</sup> [1982] E.C.R. 3641.

<sup>23</sup> [1972] E.C.R. 1219; Case 10/61 *Commission v. Government of the Italian Republic*, [1962] E.C.R. 1.



provision. However, the supremacy of GATT does not mean that GATT law always will prevail when there is a conflict between GATT law and Community law or GATT law and Member State domestic law. In fact, it seems that GATT law never will prevail in such situations. The Court's monist approach, its acclaimed open view to international law, appears to be nothing more than an ordinary avoidance doctrine at best, or even an inverted monism. Its disappointing judicial deference to the political institutions of the Community stands in violent contrast to the stout language used in *Kupferberg* where the Court refers to the "respect for commitments arising from an agreement concluded by the Community" and the "responsibility" of the Community for the "due performance" of such agreements.<sup>24</sup>

### *Interpretation*

The typical judicial deference of the Court of Justice to the Council and Commission becomes even more visible when the issue of interpretation is more closely analyzed. Evidently, the Court construes Community law dynamically and in the spirit of the 'grand design', the creation of a single market for the benefit of producers and consumers in the Member States. It has, however, always left open the possibility of interpreting differently provisions of international agreements which are similar to provisions of Community law.<sup>25</sup> In the view of the Court, provisions of such agreements are to be interpreted in the light of the objective, purpose and context of the international agreement in question. Although the Court refuses to grant direct effect to GATT, interpretation of certain GATT provisions is not technically impossible. The Court has interpreted GATT provisions in direct actions. The *Fediol IV* and *Nakajima* judgments, for example, prove that there is nothing wrong with the GATT provisions as such.<sup>26</sup> There is no technical obstacle to their interpretation. Nonetheless, the Court of Justice maintains that it will review the lawfulness of the Community act from the point of view of GATT law only if it is clear that the Community intended to implement a particular obligation entered into within the framework of GATT.

As noted, the status of GATT in Community law is determined by the Court of Justice while GATT's status is a crucial factor in moving from the second to the third stage of European

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<sup>24</sup> [1982] E.C.R. 3641, at 3662 (paragraph 13).

<sup>25</sup> Case 270/80 *Polydor and RSO Records v. Harlequin Record Shops and Simons Records*, [1982] E.C.R. 329.

<sup>26</sup> Case 70/87 *Federation de l'industrie de l'huilerie de la CEE (Fediol) v. Commission*, [1989] E.C.R. 1781; Case C-69/89 *Nakajima All Precision v. Council*, [1991] E.C.R. I-2069.

economic integration. It would seem that an open trading regime can be attained only when private parties in the Community are allowed to fully benefit from the rules of GATT. Having adopted the monist theory, the Court of Justice should draw conclusions from the fact that GATT is binding on the Community and an integral part of Community law. It should accept its direct effect in principle and assess the direct effect of the provisions in question by determining their justiciability. If justiciable, the relevant GATT provision must be considered superior to the conflicting provision of secondary Community law. At the level of interpretation, the Court may construe GATT provisions differently than, for example, similar provisions of Community law. It may interpret GATT law in the light of the context, object, and purpose of the General Agreement as a whole, as long as the core of the prohibition or positive obligation contained in the provision remains intact. The fact that there are many exceptions to the rules should not prevent the Court from interpreting them. Rules always have exceptions and this is not new to the Court. If it can handle the 'rule of reason' and Article 36 EC, it can handle the exceptions of GATT. Certainly, granting direct effect to GATT would mean a shift of power within the Community from the executive to the judiciary branch. However, such a shift of power would enhance both the procedural and substantive rights of individuals in the Community and would help the political institutions to overcome the lobby pressures which lead them to violate the law to the detriment of the Community public interest. Direct effect also would impede the Community's ability to violate the law in a reaction to violations by other WTO Members. It would force the Community to use the proper procedures under the GATT treaty. In the view of the Council, this is too much to ask. It therefore explicitly has excluded the direct effect of the WTO agreements. It still is the Court of Justice, however, which has the final word on this matter.

### *C. Case-Study: Germany versus Council*

The central case-study of this thesis was intended to provide an example of how the reluctance of the Court of Justice to intervene when the rights of individuals are affected by Community legislation may lead to serious constitutional problems. The case-study concerned an action brought by Germany under Article 173(1) of the EC Treaty for a declaration that certain provisions of Regulation 404/93 on the common organization of the market in

bananas were void.<sup>27</sup> Germany rightly refused to accept that, by a sheer act of Community intervention, market shares and thus profit potential had been transferred from Community traders in bananas originating in Latin America, many of whom were German importers, to traders in bananas originating within the Community and the ACP countries. The German government argued that fundamental human rights of Community traders had been infringed by the regulation, in particular the principles of non-discrimination and proportionality, the right to property, and the freedom to pursue a trade, as well as the principle of undistorted competition. The European Court of Justice, however, refused to declare the contested provisions void. The constitutional problem raised by this case ensues from the fact that although it must have been obvious to the Commission, the Council and the Court that the means chosen to attain the objectives of the regulation in question did not represent a first-best policy choice, violated the international obligations of the Community under GATT, and infringed the human rights of Community traders, the relevant provisions were nonetheless proposed, adopted and upheld. Apparently, the Court of Justice feels it cannot intervene if the Commission and the Council decide that they must violate international obligations and infringe individual rights in order to serve the Community public interest. Whether the Community public interest is thereby rightly conceived does not appear to concern the Court. When an important trade policy is at stake the Court typically refuses to intervene and there seem to be no limits to the discretionary powers of the Community institutions. All legislation is automatically enacted in the public interest.

A serious balancing of public interest and individual rights necessitates a pure assessment of the content of both concepts. In the view of the Court of Justice, discretionary power in the area of foreign trade policy means that contested trade measures may be declared illegal only when it is established that there was a manifest error of judgment in the choice of means used to attain the (public interest) objective in view. Apparently, the Court does have a conception of what constitutes a measure suited to attain objectives of public interest. Although it must have its own ideas on what exactly the public interest entails, in practice it allows the institutions to make overall assessments of situations, even if it subsequently appears that the presuppositions on which these assessments were based were debatable from an economic point of view. However, protectionist trade measures which are incompatible with GATT law are not even debatable from an economic point of view but are plainly wrong. It was agreed in GATT that certain trade policy instruments must be

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<sup>27</sup> Case C-280/93 *Federal Republic of Germany v. Council of the European Union*, not yet reported.

prohibited because they are harmful not only to other countries, but also - in fact, first and foremost - to the country using the trade policy instrument in question. Nevertheless, the Court allows the Community legislature to utilize these harmful instruments and it does not pronounce at all on the concept of public interest. The Court also has declared that it will protect the core of individual rights under all circumstances and, accordingly, it must have an idea of what constitutes the core of each protected right and what constitutes the periphery. However, the Court never has clarified what constitutes the core of, for example, the right to property. It would seem that taking away market shares from an efficiently operating trader and handing them over to an inefficiently operating trader needs some serious clarification. The Court, however, fails to provide it. In the current situation, the extremely broad discretionary powers in the field of foreign trade policy nullify the significance of the protection of fundamental human rights by the Court of Justice in this vital area of Community law. There is no serious balancing of interests and the Community always wins. In practice, the *Hauer* test has become a farce.

It must be admitted that the dilemma which the Court of Justice faces is complicated. From a policy perspective, balancing public interest and individual rights in the field of external trade is no easy task. At a purely intellectual level, the judges of the Court must be driven to their extremes. The Court is an institution accustomed to battling protectionism. In the Community public interest, barriers imposed by Member States to intra-Community trade are declared unlawful on almost a daily basis. The Court's vision of the public interest surely has a chapter on the 'evils' of tariffs and quotas and the value of 'optimal intervention'. Moreover, the Court knows that the Community and the Member States are WTO Members because they gain from global trade liberalization. It knows that GATT law prohibits harmful trade policy instruments, not only because these trade policy instruments are harmful to other countries but also because they are harmful to the country that utilizes them. There can be no doubt that the judges of the Court of Justice have a correct perception of what the Community public interest involves. The problem is that they feel they cannot say it. The only reason the Court remains vague on the concept of public interest is that a clarification would place the Court in conflict with the *ad hoc* policy wishes of the Community executive. The Commission and the Council do not always want to act in the interest of the Community. Likewise, the Court realizes that its protection of individual rights requires more than a simple Community-oriented view, especially in today's integrated world economy. Genuine protection of individual rights requires a global vision, the vision underlying the

GATT treaty. Only an interpretation of Community human rights principles in accordance with the corresponding GATT principles can guarantee genuine protection. Undoubtedly, the judges of the Court of Justice also have a correct perception of what true protection of individual rights involves. Again, the problem is that they feel they cannot say it. The only reason the Court remains vague on the concept of individual rights is that this clarification would also place the Court in conflict with the *ad hoc* policy wishes of the Community executive. The Commission and the Council feel they must be able to violate fundamental human rights occasionally. The question is whether their political wishes are justifiable. Is enforcing GATT law too much to ask?

Graf Otto Lambsdorf has observed that it is "strange how the very agreements on world trade liberalization that have contributed so much to prosperity in the last four decades are today making GATT almost a dirty word".<sup>28</sup> Indeed, there still is a clear taboo surrounding the GATT, an unwarranted suspicion of GATT caused by a misconception. Still, GATT is more often viewed as being a 'necessary evil' rather than as a benefit to a country's own economy. An important fact, however, often not well-perceived, is that GATT law does not compel contracting parties to pursue a particular economic policy. As Frieder Roessler has observed: "if one cuts through the thicket of the highly complex GATT rules on trade controls, one basic obligation emerges: the contracting parties shall use the most efficient policy instrument for whatever policy goal they have chosen to pursue".<sup>29</sup> Indeed, the solution to the dilemma is simple from a legal and economic point of view. Difficulties arise only when the dilemma is assessed from a 'practical politics' perspective. The solution would be to strike down all trade policy measures incompatible with GATT law as being 'manifestly erroneous' in view of the ultimate objective of the measures, that is, promotion of the public interest. At the very least, there should be a presumption that a breach of higher GATT law has an adverse impact on the objective of serving the public interest. It should be up to the Community legislature to rebut the charge and prove that the legislation is indeed adopted in the interest of the Community. In choosing this solution, the Court would both promote the Community public interest and enhance individual rights. But since it also would claim more power, and thereby upset the current (not-so-clear) separation of powers, it would take some courage to take the step.

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<sup>28</sup> See O. Lambsdorff, 'Trade: Compromise Now to Keep Growth Going', in: *International Herald Tribune*, Rome edition, Tuesday, July 6 1993, at 4.

<sup>29</sup> See Roessler, *supra* note 15, at 469.

### *D. The Functions of GATT in European Community Law*

#### *The Political Economy of EC Foreign Trade Policy*

The political economy of EC foreign trade policy poses the central question of whether the Community institutions should try to steer the EC economy or leave it to the free market forces. Both the conceptual issue of defining the Community public interest and the methodological issue of how best to explain the EC administration's actions in the foreign trade policy field were analyzed in some detail. As regards the conceptual issue, the central question was whether the Community can act as a distinctively useful agent in both national and international markets on behalf of all its constituents. Evidently, the Community can intervene on behalf of some of its constituents (for example, farmers) at the expense of others (for example, consumers) but can it act on behalf of *all* of its constituents? It was argued that it cannot. The nature and causes of the wealth of nations have been authoritatively analyzed by Adam Smith<sup>30</sup> and, today, the basic premises underlying Smith's theory are still valid. Smith showed that imposing barriers to external trade is detrimental to a country's economic welfare and that optimal welfare will ensue only when the individual is left free to pursue his own narrowly perceived objectives. Via the mechanism of the invisible hand, the country's public interest will then be served in an optimal fashion. Smith clearly saw a direct link between aggregate national income and the welfare of the least advantaged in society. He wanted to show how, through an uninhibited functioning of his system of natural liberty, the overall standard of living would be raised, and how, ultimately, the true wealth of nations, economic welfare for all, depends on the individual freedom of *homo economicus*. Organizations such as UNICE, authorities like Harvard's John Rawls and Michael Porter and Nobel Price laureate James Buchanan subscribe to Smith's views.

The wealth of nations depends on the ability of a nation's firms to produce efficiently and compete in the international market. As UNICE has explained in its report *Making Europe more competitive: Towards world-class performance*, the level of government intervention in the European Community has increased so much during the last decades that it has an extremely adverse impact on efficiency. The numerous protectionist measures of the European Community unquestionably have had a negative impact on the competitiveness of

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<sup>30</sup> See A. Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations* (1776), in the edition of R.H. Campbell, A.S. Skinner and W.B. Todd, Clarendon Press, Oxford, 1976.

Community firms. UNICE therefore recommends an open trading system with a framework of clear and effective rules. The Union suggests a 'Reformed European Model' wherein the role of the State in the economy is reduced and the roles of individuals and firms are increased. UNICE's conclusions are confirmed by Michael Porter's extensive research on 'the competitive advantage of nations'. Porter explains that foreign competition is the real key to success, because it is "the outcome of the thousands of struggles for competitive advantage against foreign rivals, ..., that underpins the process of upgrading national productivity".<sup>31</sup> Like UNICE, Porter argues that the role of the government should be restricted to creating the right environment. It is an indirect role, rather than a direct one. The conclusion must be that the Community cannot act as a distinctively useful agent in national or international markets on behalf of all its constituents. Only when the European *homo economicus* is left as free as possible to pursue his own economic interest will optimal economic welfare be attained in the Community.

The methodological issue of choosing between possible levels of analysis, 'system' or 'unit', was assessed by utilizing some basic ideas from the theory of Public Choice. It was shown that mere system level analysis, wherein the State is viewed as a rational and unitary actor, does not suffice to explain the behaviour of the EC administration in the area of foreign trade policy. Only unit level analysis, which studies the strategic interactions of all relevant domestic actors, reveals that powerful interest groups are capable of influencing government decisions. Domestic interest groups exert pressure which have a significant impact on policy decisions, while the various groups in society are unevenly represented. Producers have stronger lobbies than consumers and large firms tend to have stronger lobbies than small firms. Therefore, trade policy decisions are often inequitable. It appears that the abundant discretionary powers in the area of foreign trade policy frequently result in a harmful and inequitable redistribution of income.

#### *The Justice of EC Foreign Trade Policy*

The utilitarian-based political economy model utilized to provide the theoretical support for the main thesis of this work was supplemented by a legal pillar which finds its basis in the work of James Buchanan and John Rawls. Both Buchanan and Rawls have embroidered on themes that also have been introduced by Adam Smith. In the view of Buchanan, each constitutional order sooner or later will encounter serious disruptions. The main disruptions

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<sup>31</sup> See M. Porter, *The Competitive Advantage of Nations* (1990), p. 9.

are caused by the fact that governments always try to liberate themselves from the shackles of the social contract. A government is supposed to enforce the law but frequently does not consider itself bound by the law. Consequently, the individual will feel betrayed and eventually alienation will ensue. If the government does not comply with the law, why should citizens? For Buchanan, the central question therefore must be: "How can Leviathan be chained?"<sup>32</sup>

From a strict rights-based perspective, the only truly legitimate task of government is the protection of 'negative' rights, such as the right to life (that is, the right *not* to be killed), the right to liberty (that is, the right *not* to be confined against your will), and the right to property (the right *not* to have your property taken from you without your consent). These rights can be protected without violating anyone else's negative rights. As soon as government proceeds beyond this limited (or minimalist) task, it becomes redistributive. The benefits it confers on a certain group of citizens it must first take from some other group in society.<sup>33</sup> Although redistribution goes beyond the legitimate task of government as strictly conceived, it is not necessarily reprehensible. Governments may have good reasons to give some sort of 'extra protection' to certain deprived groups in society. It may want to protect certain 'positive' rights, such as the right to health care, the right to education, and the right to social welfare. Usually, these are rights that also protect, first and foremost, the deprived groups in society (or, as Rawls calls them, the least favoured).<sup>34</sup> Unlike negative rights, which can be protected without violating anyone else's negative rights, positive rights do infringe someone else's negative rights (for example, the right to property). From a more broadly conceived rights-based perspective - the one in accordance with the views of Smith, Rawls and Buchanan - such infringement of negative rights is justifiable, but only when the violation confers some general benefit on society which is mainly to the benefit of the least (or, at least, less) advantaged in society.

By imposing barriers to external trade, governments go beyond the legitimate task of government broadly conceived. By imposing trade barriers, negative rights of citizens are violated, for example, the right to property. A tariff deprives the consumer of buying

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<sup>32</sup> See J.M. Buchanan, *The Limits of Liberty: Between Anarchy and Leviathan* (1975), p. 13.

<sup>33</sup> See R.W. McGee, 'The Moral Case for Free Trade', 29 J.W.T. 69 (1995), p. 72.

<sup>34</sup> The 'rich' can pay for such benefits as health care and education themselves and do not need social welfare at all.



whatever he wants from whomever he wants at whatever price they can agree upon. A tariff restricts his freedom of choice and requires him to pay more for a product than would otherwise be the case. He is forced to transfer more of his property than would be the case without the tariff. Infringement of his right is justifiable only when there is a legitimate redistributive purpose. Imposition of trade barriers, however, does not have such a legitimate redistributive purpose. Import restrictions are typically justified by referring to a legitimate purpose (usually, saving jobs) but this is mere political rhetoric. It is common knowledge among professional economists, and also among trade policy officials, that protectionism destroys more jobs than it saves. Even if there were a positive right to a job, import restrictions cannot be justified. Of course, unemployment in a particular industry is disagreeable for the people concerned, but in that case it must boil down to a simple calculation. If saving one job in the steel industry destroys three jobs in the car business, saving the job in the steel industry cannot be justified. Moreover, imposing barriers to external trade actually hurts the least advantaged in society. Protectionism is most common in sectors such as food (agriculture) and clothes, which are products that make up a larger part of the household budget of groups with lower incomes as compared to groups with higher incomes who spend (relatively) less money on food and clothes and more on luxury goods. A redistribution scheme is supposed to transfer wealth from the 'rich' to the 'poor', but protectionism transfers wealth from the poor to domestic producers.<sup>35</sup> A government deceives its citizens by claiming that protectionism is necessary because it saves jobs. Jobs are actually lost, while the least advantaged are forced to sponsor the deceit.

EC foreign trade policy is still in the phase of constitutional anarchy as indicated by its unpredictability and high susceptibility to lobby pressure. The binding GATT rules do prescribe behaviour, but these rules are deliberately violated whenever deemed necessary. Although the rules do provide for ample escape routes, the EC administration often does not bother to follow the correct procedures. In order to solve this fundamental constitutional problem, a principle of equality should be introduced. It is Buchanan's answer to his own question of how to chain Leviathan. An anchoring of GATT's principle of equality in the 'Constitution' of the European Community would substantially correct 'government failure' in the area of EC foreign trade policy. It would provide the bridge to the third stage of European economic integration. However, such a fundamental change of direction requires a great deal of courage from the Court. In fact, by challenging the dominance of the EC

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<sup>35</sup> See McGee, *supra* note 33, at 75.

executive the Court would write judicial history. As comparative analysis has revealed, national courts generally tend to protect short-term governmental interests. It appears that, as a general rule, judges are extremely careful not to let their decisions impinge on their own governments' international policies. But what is the reason behind these common avoidance doctrines? The only reason can be that judges feel anxious that their interference might hurt the State's public interest. However, in the area of foreign trade policy the law is crystal-clear and in full harmony with sound economics. GATT law *serves* the public interest. Inclusion of GATT's non-discrimination principle in Community law would curb the lavish discretionary powers of the EC administration in the foreign trade policy field and would prepare the Community for the 'open' 21st century.

The Court of Justice has positioned itself at the wheel of the integration carriage and this has had, it must be admitted, its positive effects. In fact, a court faced with such a tremendous task as building a constitution for the European Community may be forgiven a certain judging *in re sua*. However, acting as a *iudex in causa sua* becomes a negative endeavour when the *causa* is too narrowly perceived. Moreover, a court never can be excused for glossing over *ad hoc* policy decisions dictated by pressure groups. When a court does this, it assimilates itself with the administration and shows that it is also susceptible to the demands of the interest group with the largest banner. If politicians are sensitive to political pressure, so be it, but judges must be independent. By enforcing GATT law, the Court of Justice would help the political institutions by providing them with an excuse to utilize in their struggle against persistent lobbies. Especially when the administration has indicated it wants to establish an open trading regime, judges might feel less uncomfortable confining its discretionary powers. Indeed, concern for the protection of individual rights, concern for the promotion of the Community's economic welfare, concern for the credibility of the EC's political institutions, and, not in the least, concern for its own credibility should encourage the Court of Justice finally to enforce GATT law without any artificial limitations and on the basis of the principle of consumer preference.

#### *E. The Future of European Economic Integration*

If to govern is to look ahead, policy making cannot escape predictions of the future. Policy which is made today is obsolete tomorrow, if tomorrow's circumstances were not taken into

account. Rational projections of the future are not based on the phase of the moon, the lines in the hands of world leaders, or the fortune-telling of Delphi's oracle. Logical predictions are based on yesterday's occurrences, the durability of today's trends, and their possible influence on tomorrow's events. As C. Fred Bergsten rightly notes, two developments in the world of today are particularly remarkable. On the one hand, there is a process of economic integration, not just in Europe but world-wide (NAFTA, Mercosur). On the other hand, there is a process of political desintegration (for example, in the former Soviet Union and in former Yugoslavia). These forces of economic integration, propelled by the logic of a coherent economic theory, and political desintegration, driven, *inter alia*, by a greater self-assurance of the citizen, eventually will lead us to a world economy "part of a single market a la EC 1992, perhaps complete with a single currency and monetary authority" and "several hundred or even more political subdivisions - regions rather than countries in an economic sense".<sup>36</sup> Trade policy makers will have to acknowledge the existence of these processes and take them into account.

In Bergsten's opinion, the process of global economic integration will be executed through regional integration whereby the European Union will lead the way by virtue of its advancement in this field. As the European integration process has taught, however, the road to full economic integration is a long and difficult one. Political opposition can be extremely persistent. Bergsten expects that global integration will encounter similar forces, but that these forces will not appear to be strong enough to call a halt to the process: "Nationalism and mercantilism will probably make one last stand, especially where nationalist aspirations were denied for decades or even centuries, before governments recognise the futility of playing King Canute to the onrushing tides of the benefits of globalism".<sup>37</sup> When after these final twitchings economic borders will have disappeared, enterprises finally will be able to expand their activities in full freedom without being hindered by artificial trade barriers. Since borders will no longer be relevant, economic units will arise which transcend traditional borders. Such units might include, for example, Mexamerica, connecting the north of Mexico with the south of the United States; South-China, with a full integration of Taiwan, Hong Kong and Guangzhou;<sup>38</sup> and Europe, including its Eastern parts and even Russia and the

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<sup>36</sup> See C. F. Bergsten, 'The Rationale for a Rosy View', *The Economist*, 11-17 September 1993, p. 59.

<sup>37</sup> See Bergsten, *supra* note 36, at 60.

<sup>38</sup> See Bergsten, *supra* note 36, at 61.

new independent republics of the former Soviet Union. Eventually, countries will realize that it is in their best interest to transfer all economic sovereignty to an overall economic organization which probably will be some kind of 'holding' of the WTO, the IMF and the World Bank.<sup>39</sup> The economic consequences of such developments will be extremely favourable: "Standards of living will rise sharply almost everywhere, ..., as technology continues to expand exponentially and virtually all regions adopt the policy reforms that began to proliferate in the late 20th century; income disparities between the richest and most of the poorest regions will decline dramatically, as the former accept more goods and people from the latter and as the poorer regions exploit the huge benefits of latecomer status".<sup>40</sup>

The process of European economic purification has greatly benefited European citizens and we are only a few reaches away from the earthly European economic paradise. But there is more beyond the borders of Europe and 'now', the eve of the 'open' 21st century, is the right time to set new goals for the future. Can we think of a better counselor than the true founder of the European Community, the intellectual father of European economic integration? Jean Monnet's plan for peace and prosperity in Europe has been extremely successful. If he had lived today, how would he have approached today's economic problems? Sir Leon Brittan provides the answer:

What would Monnet do today? I am sure that he would not be satisfied with the present extent of international cooperation. And I believe that he would take as a central objective the need to concentrate energies on ensuring that the open world trading system is set upon ever more solid foundations. The Community's existence embodies the choice made by our citizens, inspired by Monnet and his vision of economic liberalism and political cooperation over protectionism and narrow national and sectional interests. Its prosperity reveals the wisdom of that choice and has gained us a growing influence over international economic affairs. Let us accept these responsibilities and confirm that choice: for a Europe open to the world.<sup>41</sup>

The successful course of an economic integration process largely depends on a clear insight into all of its aspects and the firm will to stick to principles. The process which leads us from the darkest depths of the economic inferno to the *candida rosa* of economic paradise, where Adam Smith's light shines eternally, does not stop when economic and monetary union has been attained. The global process of economic integration is already forcing us to adapt to world competition. We had better make the connection now, for there are no boundaries to

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<sup>39</sup> See Bergsten, *supra* note 36, at 60.

<sup>40</sup> See Bergsten, *supra* note 36, at 61.

<sup>41</sup> See L. Brittan, 'The Future of an Open Europe', Jean Monnet Lecture at the European Business School, London, 3 March 1989, IP/89/129, pp. 3/4.

human knowledge. What is needed is an open trading system with a framework of clear rules which guarantee appropriate conditions of openness and competition. There is no alternative; we simply must adopt a rule-oriented and liberal approach in foreign trade affairs. The banana study shows that the Community still protects its industry whenever it feels that this is politically necessary. In such a case, the Community legislature does not care about the rules of GATT; it does not care whether its policy instruments employed are first-best, second-best or even worse; and it does not care whether fundamental rights of EC traders are violated. The Community still has its own economic masterplan, heavily influenced by political considerations. Increasingly, this approach is causing irritation in the capitals of certain Member States and an ideological split is looming. An interesting question is whether the increasing annoyance with sub-optimal pursuit of economic welfare by the Community will soon lead to change. When will the European Court of Justice take its responsibility? In *The Limits of Liberty*, James Buchanan notes that:

If our Leviathan is to be controlled, politicians and judges must come to have respect for limits. Their continued efforts to use assigned authority to impose naively formulated constructs of social order must produce a decline in their own standing. If leaders have no sense of limits, what must be expected of those who are limited by their ukases? If judges lose respect for law, why must citizens respect judges? If personal rights are subjected to arbitrary confiscation at the hands of the state, why must individuals refrain from questioning the legitimacy of government?<sup>42</sup>

At this moment, the Court of Justice appears to be caught in a trap and it seems unlikely that the judges feel content in that position. It must feel awkward having to watch on the sideline how Councils, in different compositions, hurt the European economy merely to gain domestic political support while individual rights of traders are violated. The Court of Justice has shown that it is perfectly capable of getting rid of barriers to trade. The economic concepts on which trade liberalization is based do not cause the judges much difficulty. Particularly in the European Community, true recognition of GATT principles seems feasible. The Court can be entrusted with sensible application of these principles. Actual application may have become easier now that some of the most influential figures in the European Community appear to be convinced of the virtues of an open trade regime. The view that GATT law can be instrumental to European economic progress slowly has gained recognition. Indeed, GATT law and Community law are supplementary and mutually reinforcing: Tumlin's 'plywood principle' applies.<sup>43</sup> There are no conflicting objectives. The conflicts are in the minds of

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<sup>42</sup> See J.M. Buchanan, *The Limits of Liberty: Between Anarchy and Leviathan* (1975), p. 164.

<sup>43</sup> See E.-U. Petersmann, 'Strengthening the Domestic Legal Framework of the GATT Multilateral Trade System: Possibilities and Problems of Making GATT Rules Effective in Domestic Legal Systems', in: E.U. Petersmann and M. Hilf (eds.), *The New GATT Round of Multilateral Trade Negotiations* 33 (2nd.

lobby artists and their serving politicians, who view Rawls as a silly academic and are interested only in results, be it financial or political. GATT law can be functional in that it can provide a legitimate excuse to vulnerable politicians, the excuse that their hands are tied. In this way the protectionist bias of the decision-making process would be mastered, trade policy would become more equitable, and the Community would pursue economic welfare in an optimal manner. Whether EC citizens will be prosperous in the 21st century depends to a large extent on the Court of Justice. If it recognizes the constitutional functions of GATT law, the future looks promising. If not, it looks grim. Waiting for Beatrice.

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